CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

The State of Missouri,

AT THE

OCTOBER TERM, 1877.

(*Continued from Vol. 66.*)

THE STATE v. MCDONALD, *Appellant.*

1. **An Indictment for an Assault with Intent to Kill**, though bad under Sec. 29, Wag. Stat., p. 449, because it fails to charge that the offense was committed "on purpose;" *Held* good under Sec. 32, Ib. The latter section does not require the use of those words.
2. **An Indictment for an Assault with Intent to Kill**, need not aver that defendant "had and held in his hand" the weapons with which he is charged to have made the assault.
3. **An Indictment for an Assault with Intent to Kill,** which alleges the offense to have been committed with three weapons, a pair of tongs, a hammer and an axe handle, is not void as charging an impossibility.
4. **Self Defense.** A person threatened with attack is not required to wait until stricken, but may, in the exercise of the right of self defense, strike first.

Appeal from Ozark Circuit Court.—Hon. J. R. Woodside, Judge.

E. L. Edwards & Son with *Hale & McClenden* for appellant.

1. The indictment does not charge the offense in the language of the statute. It is evidently drawn under the 29th section; and this court has held time and again, that, in drawing an indictment under this section, the offense must be charged to have been done "on purpose," which is not done in this case. This defect is not cured by the attempt of the court to try defendant under § 32 of said statute. *State v. Epps*, decided at this term.

2. There is no allegation in the indictment, that defendant "had" and "held" said weapons in his hands, which is fatal on motion to quash a demurrer. Archbold's Crim. Plead. (3 Am. Ed.) p. 315.

3. It is not alleged in said indictment that the assault was made with intent to kill Cockrum. The indictment charges that part of the offense in this manner: "With the intent, *him* the said *Henry McDonald*, *him* the said *James Cockrum*, to kill and murder." The indictment is ambiguous, and does not state whether it was McDonald or Cockrum, that was assaulted, and is therefore bad. *State v. Dalton*, 27 Mo. 13; *State v. Dillihunty*, 18 Mo. 331; *State v. Derrossett*, 19 Mo. 383.

4. The 1st instruction given for the State was erroneous. The court has no right to make out or charge a different offense from that presented by the grand jury. The 6th instruction takes the question of intent entirely from the consideration of the jury. The law presumes nothing against a defendant. The State must make out its case affirmatively, or the defendant must be acquitted. *State v. McBride*, 19 Mo. 239; *State v. Stewart*, 29 Mo. 419; *State v. Williamson*, 16 Mo. 394.

J. L. Smith, Attorney-General, for the State.

1. Although the indictment was insufficient under the 29th section, yet it was sufficient under section 32, p. 449, Wag. Stat. *State v. Stewart*, 29 Mo. 419; *State v. Seward*, 42 Mo. 206; Wag. Stat., p. 1090, § 27.

2. It was not necessary to charge that defendant held in his hands the weapons with which he made the assault. *State v. Dalton*, 27 Mo. 13; *Jennings v. State*, 9 Mo. 852; *State v. Bailey*, 21 Mo. 484; 2 Arch. Cr. Pl. 284 (1); *State v. Lutterloh*, 22 Tex. 210; *State v. Robey*, 8 Nev. 312; *State v. Urias*, 12 Cal. 325; *State v. Dent*, 3 Gill & J. 8.

3. The 6th instruction taken by itself might be open to some objection, but it is well settled that all instructions are to be taken together, and, if they fairly present the law, the judgment will not be disturbed for that reason.

Henry, J.—The defendant was indicted at the April term, 1877, of the circuit court of Ozark county, for an assault with intent to kill. The indictment charged "that Henry McDonald, on the 8th day of December, 1876, at the county, &c., did willfully, unlawfully, feloniously and of his malice aforethought, an assault make in and upon the body of one James Cockrum, with a pair of tongs of the length of two feet, and of the heft of five pounds, with a hammer of the heft of three pounds, and an axe handle of the length of two feet and of the diameter of two inches, the same being dangerous and deadly weapons, with the intent then and there, him the said Henry McDonald, him the said James Cockrum to kill and murder," &c. At the October term, 1877, of said court, there was a trial of the cause, which resulted in the conviction of the defendant, and his sentence to imprisonment in the State penitentiary for a term of three years, and from this judgment he has prosecuted his appeal to this court. A motion to quash the indictment was overruled, and the alleged defects are that the offense is not charged in the langua c

of the statute; that it is not alleged that defendant had and held the weapons in his hand; and that it was impossible for defendant to commit the offense in the manner charged in the indictment, because three weapons were charged to have been used at the same time.

It was evidently the intention of the pleader to frame the indictment under the 29th section, (Wag. Stat., p. 449), but he omitted to charge that the assault was made "on purpose," and it has so often been held by the court that an indictment is not good under that section if those words are omitted, that it must be regarded as definitely settled. The indictment was not good under the 29th section. *The State v. Epps*,* determined at this term, decided nothing more, and it is not to be regarded as overruling *State v. Stewart*, 29 Mo. 419, or *State v. Seward*, 42 Mo. 206, in which it was held that similar indictments to this, though bad as an indictment under the 29th, "sufficiently set out an offense under the 32nd section." In the *State v. Epps*, our attention was not called to the 32nd section or to the above decisions, and soon after the opinion in that case was delivered, the error was discovered, and if this cause had not been submitted, it would have been rectified; and, if on a careful examination of the record we had not been satisfied that for other errors the judgment would have to be reversed, we should have reconsidered the case and affirmed the judgment.

1. AN INDICTMENT FOR AN ASSAULT WITH INTENT TO KILL.

The indictment in that case sufficiently charged an offense under the 32nd section. Here it was not an indispensable averment that defendant "*had* and held in his hand" the weapons with which he is charged to have made the assault. That has never been held necessary in this State. *State v. Dalton*, 27 Mo. 13; *Jennings v. The State*, 9 Mo. 852; *State v. Bailey*, 21 Mo. 484.

2 AN INDICTMENT FOR AN ASSAULT WITH INTENT TO KILL.

The third objection to the indictment is, that it was impossible for defendant to make the assault as alleged.

*Not Reported.

3. AN INDICTMENT FOR AN ASSAULT WITH INTENT TO KILL.

The charge in the indictment is, that on the day named defendant assaulted —— Cockrum with three weapons; not that they were all used at the same instant of time, but in the assault which may have commenced with one, been prosecuted with another, and concluded with the third, and the evidence in the cause shows such to have been the facts as to two of the weapons. The defendant was in a blacksmith's shop. He was on the forge warming himself, holding a piece of an axe handle in his hand. The blacksmith says he appeared agitated, and kept looking through the crack of the shop, as if looking for some one. McClenden and Cockrum entered the shop. McClenden remarked that "he had backed Love out on a bet on the result of the election." McDonald said, "no one knows it but you." Cockrum then said, "there are others know it. I heard him." McDonald, who was sitting on the forge, took up a hammer or a pair of tongs, and replied: "You are a G—d d—d liar. I'll knock your brains out, you can't talk to me." Cockrum then got a pair of tongs, and they struck at each other over the shoulder of the blacksmith, who had placed himself between them. Cockrum probably struck first. McDonald went out of the shop, and immediately returned with an axe handle, but Cockrum had started off with McClenden, and McDonald went after them, calling to Cockrum, "You run, you d—d coward," and, overtaking him about seventy-five yards from the shop, struck Cockrum twice with the axe handle, breaking his arm above the elbow. This was the testimony of Smith, the owner of the shop, and the decided weight of evidence is to the state of facts testified to by him. He also testified that, sometime before the fight, McDonald said to him of Cockrum that "he would like to cut out his entrails and string them from town to where he lived."

The language he used to Cockrum in the shop, although unprovoked and of the most insulting character

4. SELF DEFENSE. of itself, would not have justified Cockrum in assaulting McDonald, but the fact that, before thus grossly insulting Cockrum, he seized a deadly weapon, gave reasonable grounds for apprehension on the part of Cockrum, that defendant intended to strike him with it. Whether he or McDonald struck first, no doubt can be entertained on the evidence that defendant was the aggressor, and that Cockrum, if he struck first, was but exercising the right of self defense. To require one under these circumstances to wait until stricken would place the man of peace at the mercy of the ruffian, and at such disadvantage that the right of self defense would be of but little value. His previous declaration to Smith that he would like to cut out the entrails of Cockrum and string them from town to where he lived, furnishes a key to interpret his conduct when Cockrum went into the shop, and leaves no doubt of his purpose to provoke a difficulty and make an opportunity to gratify his malignant feelings towards Cockrum. The difficulty in the shop, and the final conflict were one and the same transaction—one continuous assault from the beginning, until, with an axe handle, he shattered Cockrum's arm; and the charge that the assault was made with a hammer and an axe handle was literally true. It was not charging two assaults to one count, but one continuous assault with several weapons, which was neither impossible nor improbable, as the evidence clearly demonstrates. *Johnson v. The State*, 7 Mo. 183. Counsel also insist that it is not alleged in the indictment that the assault was made with the intent to kill Cockrum. The language of the indictment is, "with the intent him, the said Henry McDonald him, the said James Cockrum to kill," &c. The evident sense of the averment is that the intent of defendant was to kill Cockrum. Supply the word "of" after the word "intent" and you have the precise meaning of the averment, and, without that, it is clear enough what was meant by that averment. The instructions were as favorable to

the defendant as the law would authorize. The 6th for the State is objected to as taking from the jury the question of the defendant's intent. It declares that "the word willful means intentional, and, if the jury find from the evidence that Henry McDonald made an assault on the said James Cockrum with a deadly weapon, and with intent to kill as charged in the indictment, the law presumes he intended to do so, and it devolves on defendant to show some justifiable grounds for making the assault." It does not take from the jury the question of intent, but requires the jury to find from the evidence an intent to kill, before they can convict. It is open to verbal criticism. The declaration, that if the jury found from the evidence an intent to kill, the law presumes an intent to kill, is simply absurd. When the fact is proved, no necessity exists for any presumption of the existence of the fact. It was, however, a harmless declaration. The instructions, as to what the State was required to prove before the jury could convict, and those in relation to a reasonable doubt, placed the burden of proof upon the State, and kept it there throughout. There is no error in the record to warrant a reversal of the judgment of the circuit court, and it is affirmed. All concurring.

AFFIRMED.

FUNKHOUSER, *Appellant* v. PECK.

1. **Lands and Land Titles**: SWAMP LANDS: SELECTION OF: PAROL EVIDENCE TO IDENTIFY. Where title to land in controversy is deraigned under the act of Congress of Sept. 28th, 1850, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," parol testimony is admissible to show that such land was not swamp land within the meaning of the act, unless it has been included by the Secretary of the Interior in the lists and plats of swamp lands certified by him to the State, or had remained vacant and unappropriated until the confirmatory

act of March 3d, 1857, and had, prior to that date, been selected and reported to the commissioner of the general land office, as swamp and overflowed lands; and the fact that the land was selected and reported by the county commissioner to the register of lands, and by the surveyor general to the commissioner of the general land office, who, after suit brought, granted his certificate that certain lists of swamp lands, including the land in controversy, were true and literal copies of the original swamp land selections on file in his office, is not evidence that the Secretary of the Interior had ever certified the land as swamp land to the State. (*Clarkson v. Buchanan* 53 *Mo.* 563, *distinguished.*)

2. ———: ACTS OF CONGRESS OF JUNE 10TH, 1852, AND OF AUG. 3D, 1854, IN AID OF THE CONSTRUCTION OF RAILROADS IN THIS STATE, WHAT CONFERS TITLE UNDER: ACT OF MARCH 3D, 1857, WHAT NOT VACANT AND UNAPPROPRIATED LAND WITHIN ITS MEANING. Under the act of Congress of June 10th, 1852, entitled "An act granting the right of way to the State of Missouri, and a portion of the public lands to aid in the construction of certain railroads in said State," and the act of Congress entitled "An act to vest in the several States and Territories, the title in fee of the lands which have been or may be certified to them," approved Aug. 3d, 1854, a descriptive list of lands accruing to the State under the former act, containing the land in controversy, made out and certified on the 9th of Feb., 1854, by the commissioner of the general land office, and approved by the Secretary of the Interior, and again certified in May, 1856, by said commissioner, in conformity with the latter act, confers upon the State a title to the land in controversy, unless it be swamp land or embraced in some other grant; such land was not vacant or unappropriated within the meaning of the act of March 3d, 1857, entitled "An act to confirm to the several states the swamp and overflowed lands selected under the act of Sept. 28th, 1850," &c. *Pacific Railroad v. Lindell's heirs*, 39 *Mo.* 329 *distinguished.*

3. **Ejectment**: SWAMP LANDS: RAILROAD LANDS. When the plaintiff's claim to the land in controversy, in an action of ejectment, is founded on the swamp land grant of Congress of September 28th, 1850, he cannot recover if it appears that the land is, in point of fact, high and dry, rolling prairie, and has never been selected as swamp land by the proper officers of the general government, notwithstanding the defendant, who claims under the railroad land grant of Congress of June 10th, 1852, fails to show that the railroad company either had built its road into the county where the land lay, when it was selected by the company, or had recorded a map of the lands selected in the proper county as received by the act of the State Legislature of September 20th, 1852.

Appeal from Clinton Circuit Court.—Hon. George W. Dunn, Judge

Joseph M. Lowe for appellant.

1. By the act of Sept. 28th, 1850, the power to determine what land should be certified as swamp land was given to the Secretary of the Interior. He speaks and acts through the heads of the various departments under his control, and did, by his subordinates, designate the land in controversy as swamp land. The court below, therefore, committed an error in permitting the decision to be impeached in this collateral proceeding, and that too, by oral testimony. *Wilcox v. Jackson*, 13 Pet. 498, 513; *United States v. Arredondo*, 6 Pet. 730; *Campbell v. Doe*, 13 How. 249; *Greer v. Mezer*, 24 How. 276; *Lafayette's heirs v. Kenton*, 18 How. 199; *Stanford v. Taylor*, 18 How. 412; *West v. Cochrane*, 17 How. 415; *Lessieur v. Price*, 12 How. 448; *Minter v. Crommelin*, 18 How. 87; *United States v. Peralta*, 19 How. 347, 343; *McClung v. Sillman*, 2 Wheat. 369; *McIntire v. Wood*, 7 Cranch 504; *Delassus v. United States*, 9 Pet. 134; *Lea v, Polk Co. Copper Co.*, 21 How. 497; *Rutherford v. Greene*, 2 Wheat. 197; *Fore v. Williams*, 35 Miss. 533; *Clarkson v. Buchanan*, 53 Mo. 563; *Campbell v. Wortman*, 58 Mo. 258; *French v. Fyan*, 3 Otto, 169.

2. Respondent failed to show that the company had, prior to March 3d, 1857, filed a list of its lands in the office of the rocorder of the county where the land in controversy lies; and there was no evidence that the company had ever filed or had recorded in said recorder's office, any map of its lands, or map or profile of the part of its road located in said county. *Han. & St. Jo. R. R. Co. v. Smith*, 41 Mo. 335; *Pacific R. R. Co. v. Lindell*, 39 Mo. 329.

James Carr for respondent.

1. The land in controversy was not swamp or over-

flowed land on the 28th day of Sept., 1850, or at any other time, either prior or subsequent thereto. The State never had any claim to this land under the act of Congress of that date. It did not come within either the letter or spirit of that act. 9 U. S. Stat. at large, p. 519.

2. When the map of the definite location of the Han. & St. Jo. R. R., was filed in the office of the commissioner of the general land office, on the 10th day of June, 1853, *eo instanti* the title to every section of land designated by even numbers for six sections in width on each side of said railroad, became vested in said company, as of the 10th day of June, 1852, by relation, under the act of Congress of that date (10 U. S. Stat. at large, p. 9,) and the act of the General Assembly of this State, approved Sept. 20, 1852, (Sess. acts, p. 15,) just as, by relation, the title becomes vested by the sheriff's deed in the purchaser at a sheriff's sale, as of the day of the rendition of the judgment, under which the sale was made. *Lessieur v. Price*, 12 How. 60; *Strother v. Lucas*, 12 Pet. 454; *Rutherford v. Greene's heirs*, 2 Wheat. 196; *Ham v. Missouri*, 18 How. 130; *Cooper v. Roberts*, 18 How. 177; *Gaines v. Nicholson*, 9 How. 356; *U. S. v. Brooks*, 10 How. 442; *Guitard v. Stoddard*, 16 How. 508.

3. The same rule applies to the lands situated within the six and fifteen mile limits, as soon as they are selected and approved by the Secretary of the Interior. *Glasgow v Hortiz*, 1 Black 595; Yosemite Valley case, 15 Wall. 77; *Schulenburg v. Harriman*, 21 Wall. 44.

4. This court has twice held that when swamp lands had been certified to the Han. & St. Jo. Co., by the commissioner of the general land office, under the act of June 10th, 1852, the party claiming title thereto, under the act of Sept. 28th, 1850, might introduce parol evidence that the lands were swamp in fact, and thus rebut the *prima facie* legal title of the company. A rule, to be good, ought to work both ways, and parol evidence was admissible to show that the land in controversy was not swamp land in

fact. *H. & St. Jo. R. R. Co. v. Smith*, 41 Mo. 310; *Railroad Company v. Smith*, 9 Wall. 95; *Clarkson v. Buchanan*, 53 Mo. 563.

HOUGH, J.—This was an action of ejectment, instituted on the 8th day of November, 1873, to recover the possession of lots numbered one and two, in block numbered thirty-four, in the town of Lathrop, the same being a part of the n. e. qr. of the s. w. qr. of section 25, T. 55, R. 31, situate in Clinton county. The plaintiff claimed title under the following acts of Congress and laws of Missouri, to-wit: *First.* The act of Congress, entitled "An act to enable the State of Arkansas, and other States, to reclaim the swamp lands within their limits," approved September 28th, A. D. 1850. (9th U. S. S. at Large, p. 519.) *Second.* The 1st, 2nd, 3rd and 4th sections of the act of the General Assembly of the State of Missouri, entitled "An act donating certain swamp and overflowed lands to the counties in which they lie," approved March 3rd, 1851. (Sess. Acts 1851, 238, 239.) *Third.* The act of Congress, approved March 3rd, 1857, being an act entitled "An act to confirm to the several States the swamp and overflowed lands selected under the act of September twenty-eighth, eighteen hundred and fifty; and the act of the second of March, eighteen hundred and forty-nine." (11 U. S. S. at Large, 251.) *Fourth.* An act of the General Assembly of Missouri, approved November 4th, 1857, being an act entitled "An act amendatory of an act entitled 'An act donating swamp and overflowed lands to the counties in which they lie, approved December 13th, 1855.'" (Sess. Acts 1857, 32.)

Plaintiff read in evidence: *First.* An order of the county court of Clinton county, Missouri, made on the 4th day of August, 1853, appointing John T. Johnson, swamp land commissioner, to make selection of swamp lands of said county. *Second.* The certificate of the Register in Lands of Missouri, that the land in controversy was select

ed by said commissioner, on the 15th day of August, 1853, and that the list containing the same was reported to, and filed by the Secretary of State, on the 25th day of August, 1853. *Third.* "Additional list of swamp and overflowed lands, in the Plattsburg district, county of Clinton," containing the lands in question, to which was appended a certificate of the Surveyor-General for Illinois and Missouri, dated May 23, 1854, to the effect that he had carefully examined the same with the field notes, township plats and other evidences on file in his office, and was satisfied that the greater part of each forty acre tract, or other equivalent legal subdivision embraced in said list, was swampy or subject to overflow, within the meaning of the act of Congress of 28th September, 1850, and that said lands rightfully inured to the State of Missouri under said act.

Accompanying the foregoing was the following certificate:

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
WASHINGTON, D. C., Dec. 30th, 1873.

I, W. W. Curtis, Acting Commissioner of the General Land Office, do hereby certify that the annexed papers marked A and B, are true and literal copies of the original swamp land selections on file in this office, so far as the same relates to * * * * s w qr of Sec. 25, T. 55, R. 31. * * * * * In testimony whereof, &c.

Also, the following:

OFFICE OF REGISTER OF LANDS,
JEFFERSON CITY, Mo., May 12, 1875.

This is to certify that the foregoing is a true and correct copy of a certified copy made December 30, 1873, at the General Land Office, of an additional list of swamp and overflowed lands in the Plattsburg district, Mo., which certified copy is on file in this office.

[L. S.] GEORGE DEIGEL,
Register of Lands.

Fourth. Certified copies of letters from the Commissioner of the General Land Office to the Surveyor-General, containing instructions and rules of the land department, with reference to selecting and certifying swamp lands, the contents of which it will not be necessary to state. *Fifth.* The order of the county court of Clinton county, for the sale of the land in controversy. *Sixth.* The sheriff's report of sale, and the order of the county court approving the same, and appointing a commissioner to make a deed to plaintiff. *Seventh.* Deed executed to plaintiff by said commissioner, dated September 6th, 1873, conveying the land in controversy.

The defendant claimed title under an act of Congress entitled "An act granting the right of way to the State of Missouri, and a portion of the public lands to aid in the construction of certain railroads in said State," approved June 10th, 1852; also, an act of the General Assembly of the State of Missouri, entitled "An act to accept a grant of land made to the State of Missouri by the Congress of the United States, to aid in the construction of certain railroads in this State, and to apply a portion thereof to the Hannibal & St. Joseph Railroad," approved September 20th, 1852; also, an act of Congress entitled "An act to vest in the several States and Territories the title in fee of the lands which have been or may be certified to them," approved August 3d, 1854.

The defendant offered in evidence: *First.* A copy of the resolution of the Board of Directors of the Hannibal & St. Joseph Railroad Co., adopted on the 7th day of March, 1853, accepting the grant of land made to the State of Missouri by the Congress of the United States, filed in the office of the Secretary of State on the 17th day of March, 1853. *Second.* An exemplified copy of the map of the definite location and route of the Hannibal & St. Joseph Railroad, from the city of Hannibal to the city of St. Joseph, Missouri, with a line on same denoting the line of said railroad, and with lines and figures on the same

denoting the sections, townships and ranges, which was duly certified by the president and chief engineer of the Hannibal and St. Joseph Railroad Company, and filed in the office of the Commissioner of the General Land Office, on the 10th day of June, 1853. *Third.* A list of lands certified to the Hannibal & St. Joseph Railroad Company by the Commissioner of the General Land Office, to which is prefixed the following caption: "Hannibal & St. Joseph Railroad." A list of vacant lands situated in the Palmyra, Fayette, Milan and Plattsburg districts, State of Missouri, in the sections bearing *odd* numbers, between the *six* and *fifteen* mile limits on each side of the route of the Hannibal & St. Joseph Railroad, selected in lieu of lands sold and pre-empted and accruing to said State in virtue of the grant made by the act of Congress, approved 10th June, 1852, as more particularly set forth in the general certificate hereto appended, to-wit: * * * * * * * * The southwest quarter of Sec. No. twenty-five (25), township No. fifty-five (55), range No. thirty-one, (31).

Then follows a certificate of the Commissioner that the lands in the foregoing list had been selected on behalf of the State of Missouri, in pursuance of the provisions of said act of Congress of June 10th, 1852, in lieu of such even numbered sections and parts of sections, within six sections in width on each side of said railroad, as had been sold by the United States, or to which the right of pre-emption had attached, in accordance with the act of Congress aforesaid, and a recommendation that the selection and appropriation of said lands to the State of Missouri be approved, subject to any valid interfering rights. Subjoined is the following:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, February 9, 1854.

Approved, subject to any valid interfering rights.

R. MCCLELLAND, Secretary.

Appended to the foregoing is a certificate from the

Commissioner of the General Land Office, dated in May, 1856, recapitulating the said caption, certificate and approval, and concluding with the statement that the said lists are now again certified in conformity with the provisions of the act entitled "An act to vest in the several States and Territories the title in fee of the lands which have been or may be certified to them," approved 3rd of August, 1854. It appeared in evidence that the Hannibal & St. Joseph Railroad was completed the latter part of February, 1859, and that it was completed to within twenty miles of Clinton county the first of January, 1859.

Testimony was admitted, against the objections of the plaintiff, showing that the land in controversy was high, dry, rolling prairie; that no part of it was swamp land, or subject to overflow, and that all of it was fit for cultivation without artificial drainage or embankment, and that such had been its character ever since the witnesses first knew it, in 1837. It was admitted that the defendant was in possession of the land sued for, under a valid deed from the Hannibal & St. Joseph Railroad Company. This was all the evidence offered. The cause was tried by the court, without the aid of a jury.

The plaintiff asked the following declarations of law: "That the land in controversy having been selected by John T. Johnson, agent of Clinton county, as swamp or overflowed land, and he having reported the same to the Surveyor-General, who, under instructions from the Commissioner of the General Land Office, certified the same to said Commissioner of the General Land Office, on the 23d day of May, 1854, as swamp or overflowed land, and said lands having been certified to the Register of Lands for the State of Missouri, and said lands having been donated to the county of Clinton, and by the county court thereof, through its officer, the sheriff of said county, sold to the plaintiff, the court therefore declares the law to be for the plaintiff, and finds that he is entitled to the possession thereof for the following reasons: *First.* Because the de-

fendant failed to show, to the satisfaction of the court, that the Hannibal & St. Joseph Railroad Company, under whom defendant claims, had, prior to the 3d day of March, 1857, commenced the construction of its railroad, or that it had completed any part thereof in Clinton county, or within twenty miles thereof. *Second.* Because defendant failed to show that said company had, prior to said date, filed a list of its lands in the office of the recorder of deeds of said county. *Third.* Because it is not shown in evidence that said company has ever filed or had recorded, in the office for recording deeds in said county, any map of its lands, nor map or profile of the part of its road, located in said county." The foregoing declarations were refused by the court.

At the instance of the defendant, the court declared the law to be that "plaintiff must recover in this case, if at all, upon the strength of his own title, and not upon the weakness of defendant's, and before plaintiff can recover, he must show an absolute legal title to the land in suit."

The court then made the following finding of facts and declaration of law: *First.* That the Hannibal & St. Joseph Railroad was definitely located on the 10th day of June, 1853. *Second.* That a copy of such location was forwarded to the local land office and to the general land office at Washington, and recorded in said general land office, on the 10th day of June, 1853. *Third.* That lists and plats, including the land in controversy, were issued and delivered to the Hannibal & St. Joseph Railroad Company by the Commissioner of the General Land Office, approved by the Secretary of the Interior, on the 9th day of February, 1854. *Fourth.* That the Hannibal & St. Joseph Railroad was fully completed on the 24th day of February, 1859. *Fifth.* That the land in controversy is within fifteen miles of the Hannibal & St. Joseph Railroad, and that the same was not swamp or overflowed on the 28th day of September, 1850. *Sixth.* That the defendant is in possession of the land in controversy, under a valid deed

from the Hannibal & St. Joseph Railroad Company. And the court declares the law to be, that such facts vest the title to the land in controversy in the grantee of the Hannibal & St. Joseph Railroad Company; that the plaintiff has no title to said land, and that the verdict and judgment of the court must be for the defendant. Judgment was rendered accordingly, and the plaintiff has appealed to this court.

1. LANDS AND LAND TITLES: swamp lands: selection of: parol evidence to identify.

The first error assigned, requiring notice, is the admission of the parol evidence offered by the defendant, showing that the land in controversy was not swamp land within the meaning of the act of Congress of 28th of September, 1850. This testimony is now objected to on the ground that the officer of the United States whose duty it was to act in the premises, had certified said land to the State in pursuance of the act of Congress of September 28th, 1850, and his decision was conclusive; and because the title to said land was confirmed to the State under the act of Congress of March 3d, 1857. As the only objection to the admission of this testimony made by the plaintiff in the trial court, was, that the title had vested in the county of Clinton prior to any claim of the defendant to said land, and as this general objection does not, in our opinion, necessarily include the specific objection now made, we might very properly decline, under previous adjudications, to entertain an objection to testimony made for the first time in this court; but, as the admissibility of this testimony depends upon facts which have an important bearing upon the merits of the controversy, it will be as convenient to consider those facts now, as at any other stage of our inquiry.

Is it true that the officer whose duty it was to act in the premises, ever certified to this State the land in controversy, as swamp land? It is claimed that the Commissioner of the General Land Office made such certificate to the Register of Lands of Missouri. We do not conceive

that the duties imposed upon the Secretary of the Interior by the swamp land act of 1850, could be performed by the Commissioner of the General Land Office, without some lawful, special delegation of authority; and no such authority appears in the record. Conceding, however, that the rule announced in *Wilcox v. Jackson* 13 Peters, 513, that "the president speaks and acts through the heads of the several departments, in relation to subjects which appertain to their respective duties," is also applicable to the heads of departments themselves, and that they likewise speak and act through the chiefs of the various departmental subdivisions under their supervision and control, and that the duties imposed by the swamp land act upon the Secretary of the Interior could be performed by the Commissioner of the General Land Office, as contended by the plaintiff, and it will avail him nothing. The land in controversy was never certified by the Commissioner of the General Land Office to the Register of Lands, in pursuance of the swamp land act of 1850.

On the 30th day of December, 1873, nearly two months after the institution of the present suit, the Commissioner of the General Land Office granted a certificate that certain lists of swamp lands, which included the land in controversy, were true and literal copies of the original swamp land selections on file in his office. But there is nothing accompanying this certificate, nor on the face of it, conducing to show, even in the faintest degree, that the Commissioner of the General Land Office had approved, or intended to approve, the selections contained in said list. Before this list ever reached the commissioner's office, the land now in controversy had been certified by him to the State under the act of 1852. Indeed, there is nothing to show that the list and certificate were ever intended for the Register of Lands of Missouri, or that they were ever designed to constitute anything more than an ordinary exemplification of the records on file in the commissioner's office. How they reached the register's office does not ap-

pear, but it is plain, from the face of the papers, that their presence there confers no rights upon the State of Missouri, and none, therefore, upon the county of Clinton. It is quite evident, from the certificate of the register himself, that he did not regard the list as a part of the records of his office, for the list is certified by him to be a copy of a certified copy made December 30th, 1873, at the General Land Office. Nor can the effect which we have given to the certificate of the Commissioner of the General Land Office be enlarged by reason of anything said by this court in the case of *Clarkson v. Buchanan*, 53 Mo. 571, cited by appellant's counsel. It was said in that case: "The plaintiff produced in evidence a list of the swamp lands in Macon county, certified from the office of the Register of Lands, embracing this tract, and that was *prima facie* evidence. The presumption is that the list was legally and correctly there." But the list certified by the Register of Lands in that case, as shown by the record, was a "list of swamp lands in Macon county, *selected*, *approved* and *patented*," copied from the records and documents on file in his office, and not a mere copy of an exemplification of the files of the general land office, on which no action had ever been taken by the Secretary of the Interior or the Commissioner.

If the lands in question were not, in fact, swamp lands, and the Secretary of the Interior had not included them in any lists and plats of swamp lands certified by him to the State, then, notwithstanding they were selected and reported to the Register of Lands by the county commissioner, and to the Commissioner of the General Land Office by the Surveyor-General, the title to them could not vest in the State as a part of the grant made by the act of 1850, prior to the confirmatory act of March 3d, 1857, the effect of which act was to vest in the State the title to all lands which had at that date been selected and reported to the Commissioner of the General Land Office as swamp and overflowed lands, whether they were in fact swamp

lands or not, provided the same were then vacant and unappropriated. Whether the lands in question, therefore, were in fact swamp lands, was a pertinent and important inquiry, and the testimony was properly admitted.

Regarding the finding of the court, that the lands in controversy were not swamp lands, as conclusive of that question in this proceeding, we proceed to inquire whether said lands were vacant and unappropriated at the passage of the act of March 3d, 1857. By reference to the statement we have made, it will be seen that a descriptive list of lands accruing to the State under the act of June 10th, 1852, containing the land in controversy, was made out and certified on the 9th of February, 1854, by the Commissioner of the General Land Office and approved by the Secretary of the Interior; and afterwards, in May, 1856, said list was again certified by the Commissioner of the General Land Office, in conformity with the provisions of the act of Congress of the 3d of August, 1854. That act is as follows: "That in all cases where lands have been, or shall hereafter be, granted by any law of Congress to any one of the several States and Territories; and where said law does not convey the fee simple title of such lands, or require patents to be issued therefor, the lists of such lands, which have been or may hereafter be certified by the Commissioner of the General Land Office, under the seal of said office, either as originals, or copies of the originals or records, shall be regarded as conveying the fee-simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim or interest shall be conveyed thereby."

2. ——: acts of congress of June 10th, 1852, and of Aug. 3d, 1854, in aid of the construction of railroads in this state, what confers title under: act of March 3d, 1857, what not vacant and unappropriated land within its meaning.

This court, in commenting upon the foregoing act, in the *Han. & St. Jo. R. R. Co. v. Smith*, 41 Mo. 310, 329, said: "That the act of Congress of 1852 was one of the acts here referred to, there is little room for doubt. It did not directly convey the fee-simple to any specific and certain tracts of land, nor did it require patents to be issued. The particular sections, or parts of sections, which were to be the subject of the grant, remained to be ascertained in future. * * * * We suppose the proper effect of this provision of the act of 1854 to be, that such lists shall be regarded as evidence of this (the) location and identity (of the lands granted) sufficient to bring the tract of land therein contained and described, within the granting words of the act of 1852, and so to convey the title in fee-simple; but if the lands embraced in such lists are not of the character contemplated by the act of Congress, and are not such as were intended to be granted thereby, then the lists are to have no effect as evidence." In another connection, speaking of the act of 1852, (p. 335), the court said: "No means of proving a title to the specific lands granted was provided by the act itself. The act of 1854 seems to have been intended to supply this defect. In *Baker v. Gee*, 1 Wall. 333, these descriptive lists were recognized as being the proper evidence to show the lands to which the road was entitled." In the foregoing case of *Han. & St. Jo. R. R. v. Smith*, parol testimony was admitted to show that the lands were swamp land, and therefore not of the character contemplated by the act of 1852; and the railroad company, which claimed title under a certified list made by the Commissioner of the General Land Office, in pursuance of the act of 1854, was defeated on that ground alone.

The lists offered in evidence by the defendant in this case, undoubtedly conferred upon the State the title to all the lands therein described, which were not swamp lands, and not embraced in some other grant. And, it is immaterial, so far as the State's title is

3. EJECTMENT: swamp lands: railroad lands.

concerned, whether or not the road was completed to or through Clinton county, at the time the selections were made. Counsel for plaintiff is in error when he states that "the act of June 10th, 1852, authorized the Secretary of the Interior to select the land to which the road was etitled, *only as each twenty miles of said road was built.*" That act simply restricted the right of the State to sell the land thereby granted, by providing "that a quantity of land not exceeding one hundred and twenty sections on each road, and included within a continuous length of twenty miles of said road, may be sold; and when the Governor of said State shall certify to the Secretary of the Interior that said twenty miles of said road is completed, then another like quantity of land hereby granted may be sold;" and it was further provided that if the road was not completed within ten years, no further sales should be made, and the land unsold should revert to the United States. The road, as we have seen, was completed in 1859, about seven years after the passage of the act.

A portion of these lands were granted by the State to the Hannibal & St. Joseph Railroad Company, by the act of September 20th, 1852, subject to the conditions, reversion, and provisions contained in the act of Congress; and by said act of the General Assembly the company was further required to place upon record in the several counties through which said road was located, and within one year after its location, maps of the lands lying in said several counties, taken and obtained for the use of the road. By the 5th section of that act, the privilege of pre-empting said land was conferred upon certain settlers; and in the case of *Baker v. Gee*, 1 Wall. 335, the validity of the State statutes, imposing burdens and conferring privileges upon the grantees of the State was admitted, and it was held that a grantee of the railroad company could not recover against a defendant claiming by pre-emption under the State, without showing that a map of the lands selected

and located for the railroad had been duly recorded, as required by statute.

On the authority of this case, and that of *Pacific Railroad v. Lindell's Heirs*, 39 Mo. 329, it is contended by the plaintiff that as the defendant failed to show that the railroad had complied with the statute requiring maps of its lands to be recorded, the title never vested in the company, and the plaintiff is entitled to recover. In the first case, both parties claimed under the act of September 20th, 1852, and the only question was which had acquired the better right under that act. It was conceded that the title was in the State by virtue of the railroad grant of June 10th, 1852, and the contest was as to whether the plaintiff or defendant had acquired that title. The case of *Pacific Railroad v. Lindell's Heirs*, 39 Mo. 329, is totally unlike the case at bar, and is no authority for the position assumed by the plaintiff. There, the railroad company was plaintiff, and was bound to show title in itself—and it was not only held that no title had vested in the railroad, by reason of its failure to record maps of its lands, but it was also held that no title ever vested in the State. The lands in controversy in that case had not been certified to the State, under the act of 1854; besides, they were reserved from the grant of the 10th of June, 1852, as they were covered by a valid location made in 1833, under the act of Congress of February 17th, 1815, for the relief of the sufferers by earthquake in New Madrid.

So far as the plaintiff's right to recover in the present action is concerned, it is wholly immaterial whether the railroad company has or has not complied with the requirement of the statute in relation to recording maps of its lands. It is quite clear that if the legal title has never vested in the railroad company in consequence of its non-compliance with the statute, the title is in the State, by virtue of the grant of 1852, and the action of the Commissioner of the General Land Office, under the act of 1854. The completion of the road in 1859 prevented a reversion

to the United States, and the title is either in the defendant or in the State. Whether it is in the one or the other, need not now be determined. If the title is not in the plaintiff, that disposes of the present controversy.

Our opinion is, that at the passage of the act of March 3d, 1857, the land in question had been legally appropriated to aid in the construction of railroads in this State, and did not pass to the State as a part of the swamp land grant. The confirmation of 1857 could not take effect by relation, so as to extinguish a valid right acquired before the passage of the confirmatory act. The judgment of the circuit court will be affirmed. The other judges concur.

AFFIRMED

STATE v. REED, *Appellant.*

Practice, Criminal: DEFECTIVE RECORD: CERTIORARI: NEW TRIAL. When the record originally sent to the Supreme Court is defective, and it appears by a return to a writ of *certiorari* awarded for the purpose of supplying the defects, that the original papers in the case have been stolen, so that they cannot be supplied, a new trial will be ordered. The accused is entitled to have his case reviewed on a correct record.

Appeal from Christian Circuit Court.—HON. W. F. GEIGER, Judge.

John P. Ellis for appellant.

1. The defendant is entitled to have, and the State is bound to furnish a transcript correct in all material particulars. Where the record is defective only in immaterial respects, a writ of *certiorari* cannot be awarded. By awarding the writ in this case, this court has given judgment that the defects are material. In cases of felony, the accused has a right to stand upon all his legal rights, that

he has not expressly waived by the record, or that have not been taken away by the statute. *State v. Armstrong*, 46 Mo. 588; *State v. Daily*, 45 Mo. 153; *Sweeden v. State*, 19 Ark. 205.

J. L. Smith, Attorney-General, for the State.

NAPTON, J.—The defendant was indicted in Greene county on the 14th of May, 1870, for the murder of A. Hollingsworth, and a change of venue was awarded to the county of Christian, and at the March term, 1871, of the Christian circuit court a trial was had and the defendant convicted of manslaughter in the third degree, and sentenced to two years imprisonment in the penitentiary. The defendant appealed to this court, and a *supersedeas* was granted. The transcript of the proceedings in the case having been filed in 1871, and the case docketed in 1874, the appellant suggested a diminution of the record, stating various defects, omissions and incorrect statements in the record, supported by the affidavit of his attorney, and upon his motion a *certiorari* was awarded. To this a return was made, stating that the clerk's office had been broken open, on a night stated, and nearly all the papers in this case stolen. The record sent up in obedience to the last *certiorari* is in fact greatly more defective than the first record, which was so defective as in our opinion to authorize the writ. The defendant's attorney filed a motion to reverse the judgment, inasmuch as no record can be procured, and the defendant is entitled to have his case reviewed by this court. This motion was taken under advisement, and we are now of opinion that it should be sustained. The judgment is therefore reversed and the case remanded. The other judges concur.

REVERSED.

STATE *ex rel.* GANZHORN, *Appellant* v. CARR.

City Ordinance, WHEN NOT A LAW WITHOUT THE MAYOR'S SIGNATURE. When the charter of a city provides that "every ordinance, before it shall become a law, must be * * * presented to the mayor for his approval; if he approves the bill, he shall sign it; if not, he shall return it with his objections to the city council, * * * but, if any bill shall not be returned by the mayor within ten days * * after it shall have been presented to him for his approbation, the same shall become a law in the same manner as if he had approved and signed it;" *Held*, that when, after such presentation of a bill to the mayor, the council adjourns, *sine die*, before the ten days expire, and before the mayor signs the bill, it does not become a law; that, otherwise, it would be in the power of the council by such adjournment to nullify the charter and dispense with the concurrence of the mayor.

Appeal from St. Louis Court of Appeals.

The case is reported in 1 Mo. App. 490.

Owens & Wood with *H. B. Lighthizer* for appellant.

The charter distinctly declares, and in most positive terms, that the ordinance must be returned by the mayor within the ten days, or it shall become a law in the same manner as if he had approved and signed it; hence, if the council be not in session during the whole ten days, to avail himself of his qualified privilege of veto, he must return it before the adjournment, and within ten days, or it becomes a law independent of his action. 1 Story's Com. on Const. § 891.

Leverett Bell for respondent.

The time specified by the charter, during which the mayor may retain an ordinance, is for his deliberation and consideration thereof, and the council cannot, within that period, deprive him of that right by adjourning the session *sine die*. Curtis' History of Const. Vol. 2, p. 57; *Fowler v. Pierce*, 2 Cal. 172; *People v. Hatch*, 19 Ill. 283.

HOUGH, J.—On the 22nd day of March, 1870, an ordinance was passed by the city council of the city of St. Louis, directing the auditor of said city to draw his warrant upon the treasurer thereof, in favor of the relator for the sum of $5108.91. This ordinance was signed by the president of the council, and forwarded to the mayor for his approval, but was neither approved by the mayor nor returned by him to the council, that body having adjourned *sine die* within ten days after the passage of said ordinance. The object of the present proceeding is to compel the auditor to draw a warrant in conformity with the provisions of said ordinance. The judgment of the circuit court was adverse to the claim of the relator, and that judgment was affirmed by the Court of Appeals.

The question presented for our determination is, whether the ordinance directing the warrant to be drawn in favor of the relator, ever became a law. The provision of the city charter bearing upon this question, is as follows: "Every ordinance, before it shall become a law, must be signed by the president of the city council, and presented to the mayor for his approval; if he approves the bill, he shall sign it, if not, he shall return it, with his objections, to the city council, which objections shall be entered at large upon the journal, and the bill shall be reconsidered; after such reconsideration, the yeas and nays shall be called, and recorded, and if two-thirds of all members elected to the city council shall vote for the bill, it shall become a law; but if any bill shall not be returned by the mayor, within ten days (Sundays excepted), after it shall have been presented to him for his approbation, the same shall become a law in the same manner as if he had approved and signed it." It was the manifest purpose of this provision that the mayor should have ten days in which to return to the council a bill which he did not approve; and the only contingency in which a bill not approved by him, and not passed over his veto, could become a law, was, where he

had omitted, not for two days, nor for five days, nor until the adjournment of the council, but for the period of ten days, to return the same. Now, when the council adjourns without day, before the ten days allowed by the charter have expired, how can it be said that the mayor has omitted for the period of ten days to return the bill? The council may render it impossible for the mayor to return a bill at all. They might adjourn immediately after its presentation to the mayor, and before he could possibly consider it. Would it be pretended in such a case, that the bill would become a law? Such a construction would put it in the power of the council to nullify the charter and dispense with the concurrence of the mayor in all cases. We should experience no hesitancy whatever in announcing the rule above stated as the correct one, but for the remarks of Judge Story, in his commentaries, on a corresponding provision in the constitution of the United States, speaking of the veto power. He says: "The constitution, therefore, has wisely provided that if any bill shall not be returned by the president within ten days, (Sundays excepted,) after it shall have been presented to him, it shall be a law, in like manner as if he had signed it. But if this clause stood alone, Congress might, in like manner, defeat the due exercise of his qualified negative by a termination of the session, which would render it impossible for the president to return the bill. It is therefore added, 'unless the Congress by their adjournment, prevent its return, in which case it shall not be a law.'" As was remarked by the judge who delivered the opinion of Court of Appeals in this case, if the question before Judge Story had been a practical one, the foregoing observations would be entitled to the very gravest consideration. But, having been expressed upon a hypothetical case, though they may fitly illustrate the wisdom of the convention which framed the constitution, they cannot be regarded as an authoritative exposition of the law on the point now if under consideration. Indeed we very much doubt whether

Judge Story had been called upon to judicially determine the question here presented, he would not have held that the concluding sentence of the constitutional provision referred to, was added by the framers of that instrument out of abundant caution, and in order to remove all occasion for cavil or dispute as to the right of the executive to participate in the enactment of all laws, and not because it was deemed essential to confer that right. We are entirely satisfied with the conclusion reached by the Court of Appeals, and also with the reasoning by which that conclusion is supported, and its judgment will therefore be affirmed. The other judges concur.

AFFIRMED.

THE STATE v. CHUMLEY *et al.*, *Plaintiffs in Error.*

1. **Assault to Kill**: STATUTORY OFFENSE: REQUISITES OF INDICTMENT. An indictment under section 32, p. 449, Wag. Stat., for an assault with intent to kill, need not state what weapon was used in making the assault. The offense being a statutory offense, the indictment is good if it describes it in the language of the statute.
2. **Assault to Maim and Kill**: MAYHEM: RULES AS TO CONVICTIONS. The rule that where it appears that a crime has actually been perpetrated, no conviction can be sustained for an attempt to perpetrate it, is not applicable to a case where one indicted for an assault with intent to maim, disfigure and kill, is convicted of an assault with intent to kill, upon evidence which proves an actual mayhem. The conviction of assault with intent to kill amounts to an acquittal of assault with intent to maim.
3. **Practice, Criminal**: AMENDMENT OF VERDICT. It is not error for the trial court, at the suggestion of the prosecuting attorney, to allow the jury, before they are discharged, in open court and in the presence of defendant and his counsel, to make a formal correction in their verdict, so as to make it conform exactly to what they have found.

Error to Gasconade Circuit Court.—Hon. A. J. Seay, Judge.

Lay & Belch for plaintiffs in error.

1. The instrument, with which the assault was made, or the manner of making the assault, should be set out in the indictment. *Beasley v. State*, 18 Ala. 535; *State v. Johnson*, 11 Texas 22; *People v. Davis*, 4 Parker Cr. Ct. 61; 1 East P. C. 419.

2. The verdict was changed in matter of fact material; this cannot be done. *State v. McBride*, 19 Mo. 239; *Whitehead v. State*, 10 Ohio St. 449; *Malton v. People*, 15 Ill. 536; 6 Ala. 483; *Prince v. State*, 35 Ala. 367; *Commonwealth v. Robey*, 12 Pick. 496; *State v. Thompson*, 30 Mo. 470; *State v. Brown*, 60 Mo. 141.

3. The proof of the actual commission of the felonious maiming and disfiguring, charged in the indictment, renders the verdict upon this indictment, charging the felonious assault with intent a nullity under our statute. 1 Wag. Stat., p. 511, § 2.

J. L. Smith, Attorney-General, for the State.

Duplicity in an indictment is cured by a verdict of guilty on one of the offenses charged, and not guilty on the other, and moreover such objection can only be taken by demurrer or motion to quash, but not at a later stage of the proceedings. 1 Whart. Crim. Law, Sec. 395; *Commonwealth v. Tuck*, 20 Pick. 356; *Hilderbrand v. State*, 5 Mo. 548. Besides, the alleged defect would be cured by our statute of jeofails, which provides that "no indictment shall be held invalid, for any surplusage or repugnant allegation when there is sufficient matter alleged to indicate the crime and person charged." 2 Wag. Stat., p. 1090, § 27. No objection was made to the action of the court in

permitting the prosecuting attorney to change the verdicts as set out.

HENRY, J.—At a special term of the Gasconade circuit court, held in July, A. D. 1875, defendants were jointly indicted and tried for a felonious assault upon one Joseph Coulter. The indictment contained two counts, one under the 29th and the other under the 32nd section, Wag. Stat., p. 449. The second count of the indictment alleged that defendants, on the 23rd day of June, 1875, at, &c., upon the body of one Joseph Coulter, unlawfully, willfully and feloniously did make an assault, with intent him, the said Coulter, then and there feloniously, willfully and unlawfully to maim, disfigure and kill. No motion to quash was filed, but on a motion in arrest, the objections now urged were made to the indictment. First, that the indictment should have set out the manner in which the assault was made, and the weapon used.

The offense charged was a statutory offense, and it is generally sufficient in such cases to describe the offense in the language of the statute. An indictment, under the 29th section must state the instrument or means employed, but under section 32 this is not necessary. This proposition we think sustained by *Beasely v. The State*, 18 Ala. 535, cited by appellants' counsel. The court there said: The rule is, that when a statute creates a new offense, and describes its ingredients, it is sufficient in an indictment to describe the offense in the language of the act. That was an indictment for an assault with intent to commit murder, and the court held that it was not a statutory offense, and that it must be described as at common law.

1. ASSAULT TO KILL: statutory offense: requisites of indictment

Here the evidence showed that one of the defendants, with a knife, inflicted a severe wound upon Coulter's arm, and it is contended that, therefore, a verdict of guilty of an assault with intent to kill should not be permitted to stand, because there was an

2. ASSAULT TO MAIM AND KILL: mayhem: rules as to convictions.

actual commission of the offense of mayhem, and that, when one is indicted for an assault with intent to commit a crime, and the evidence shows the crime actually committed, he cannot be convicted of an assault with the intent to commit that crime. Conceding that to be the law, the defendants were not found guilty of an intent to maim, but, on the contrary, the authorities cited by appellants' counsel hold that the verdict of guilty of an assault with intent to kill amounts to an acquittal of an assault with intent to maim. When several intents are charged, as in this indictment, proof of one is sufficient to warrant a conviction; and while an intent to maim was charged, no such intent was proved, or found by the jury, and the fact that Coulter was maimed, no more entitled defendant to an acquittal, than if an intent to maim had not been charged in the indictment, but only an intent to kill. If, in an assault with intent to kill the person assaulted be actually maimed, proof of such maiming will not prevent a conviction of an assault with intent to kill. Counsel argue that, "if there is a consummation of one of the intents, then, because the defendants may have intended also the consummation of the other intent, it will not warrant a conviction of an assault with intent." If the evidence had proved, or the jury had found a specific intent to maim, there would be some plausibility in the argument; but as that intent was neither proved nor found by the jury, but on the contrary, the jury found that there was no such intent, the fact that in assaulting with intent to kill they actually maimed, leaves the case as if the indictment had only been for an assault with intent to kill. Sec. 2, Wag. Stat., 511, has no application here. That provision is that, "no person shall be convicted of an assault with intent to commit a crime, or of any other attempt to commit an offense, when it shall appear that the crime intended, or the offense attempted, was perpetrated by such person at the time of such assault or in pursuance of such attempt." It is sufficient to say that these defendants were not convicted of an assault

with intent to maim, but were acquitted of any such intent.

The jury returned a verdict finding defendants "guilty on the second count in the manner and form as therein set forth," and assessed the punishment of Samuel at a fine of $100 and imprisonment in the county jail for a term of three months, and that of John at two years imprisonment in the State penitentiary. At the suggestion of the prosecuting attorney the verdict was changed by inserting the words "with intent to kill," so that it read: "We the jury find the defendants guilty of an assault upon Joseph Coulter with intent him to kill in manner and form as charged in the second count of the indictment, and assess, &c." The trial of the defendants was for an assault with intent to kill. The instructions of the court to the jury, were confined to that charge in the indictment. There was not a particle of evidence that defendants only intended to maim. The court gave no instructions in regard to mayhem, or upon any other intent alleged in the indictment, except the intent to kill. The correction of the verdict was made in open court before the jury was discharged. The amended verdict was signed by the foreman in the presence of his fellows, and, at the instance of defendants' counsel the jury was polled, and each member declared the amended verdict to be his verdict. It was but a formal correction, making the verdict conform exactly to what the jury found, and the court did not commit error in allowing it to be made. The instructions are not here complained of, but they correctly declared the law. All concurring, the judgment is affirmed.

3. PRACTICE CRIMINAL: amendment of verdict.

AFFIRMED.

THE STATE, *Plaintiff in Error* v. COX.

A Writ of Error does not lie on behalf of the State in a criminal case, (*following State v. Copeland*, 65 *Mo.* 497).

Error to Cole Circuit Court.—HON. GEORGE W. MILLER, Judge.

J. R. Edwards for the State cited *State v. Newkirk*, 49 Mo. 472; *State v. Peck*, 51 Mo. 112; Wag. Stat., p. 1112, § 2.

Henry Flanagan for defendant in error.

1. A writ of error is not allowed to the State in a criminal case; its remedy is by appeal. 2 Wag. Stat., p. 1112, § 1; p. 1114, §§ 13, 14.

2. No writ of error lies where an appeal is allowed, unless the former remedy be also given by express terms. Without the aid of the statute, the State cannot review the judgment of an inferior court. *People v. Casborns*, 13 Johns. 351; *People v. Tarbox*, 30 How. Pr. 318; *People v. Dill*, 1 Scam. (Ill.) 257; *State v. Reynolds*, 2 Hay. (Tenn.) 110; *Commonwealth v. Harrison*, 2 Virg. Cases 202; *People v. Corning*, 2 Comst. (N. Y.) 9; *The San Pedro*, 2 Wheat. 132; *McCollum v. Eager*, 2 How. U. S. 61; *Surgett v. Lapice*, 8 How. 48; *Verden v. Coleman*, 22 How. 192; *Parish v. Ellis*, 16 Pet. 451; *McDaniel v. Plumbe*, 3 Iowa (Greene) 331; *McPoland v. Fitzpatrick*, 1 Greene (Iowa) 543; *Bradford v. Marvin*, 2 Fla. 101; *Harris v. Cole*, 2 Fla. 400; *Gibson v. Rogers*, 2 Ark. 334; *Russell v. Pierce*, 7 Porter (Ala.) 276; *Miller v. Goffe*, 9 Porter (Ala.) 265; *Ex parte Sandford*, 5 Ala. 562; *Springer v. Springer*, 43 Pa. St. R. 518; *Wike v. Lightner*, 1 Rawle (Pa.) 289; *Baker v. Williamson*, 2 Pa. St. R. 116; *Lord v. Pierce*, 33 Maine 350; *Peebles v. Rand*, 43 N. H. 337; *Flanders v. White Mountain Bank*, 43 N. H. 383; *Medcalf v. Serett*, 1 N. H. 338; *Monk v. Guild*, 3 Met. 372; *Savage v. Gulliver*, 4 Mass. 171; *Jarvis v.*

Blanchard, 6 Mass. 4; *Champion v. Brooks*, 9 Mass. 228; *Parmenter v. Parmenter*, 3 Head (Tenn.) 225; *Delaplaine v. The City of Madison*, 7 Wis. 407.

SHERWOOD, C. J.—The defendant indicted for bigamy successfully demurred to the indictment. The State sued out a writ of error. The motion filed by defendant's counsel, questions the right of the State to bring up a criminal case in this way; and this is the only point that need be considered. In the case of *The State v. Copeland*, 65 Mo. 497, we held from a mere examination of the statute, and the changes made therein since the decision delivered in *The State v. Spear*, 6 Mo. 644, that a writ of error would lie in a criminal case in behalf of the defendant *alone*. And we think that an examination of the statute in question, especially when considered in connection with the history of its changes, whereby it has been brought into its present shape, is absolutely conclusive against the right of the State to sue out a writ of error. But another reason would seem equally cogent in support of the position we assumed, and lies in the fact that the State possesses no such right under the statute, unless *expressly conferred*. (*State v. Reynolds*, 2 Hayw. 110; *The People v. Corning*, 2 Comst. 9; *Commonwealth v. Cummings*, 3 Cush. 212; *State v. Johnson*, 2 Iowa 549; *Commonwealth v. Harrison*, 2 Virg. Cas. 202.) That the statute in relation to criminal practice, neither in express terms, nor yet indirectly, authorized the State to sue out a writ of error, is patent to even casual observation.

For the reason herein expressed, as well as those announced on a former occasion, we grant the motion and quash the writ. All concur.

MOTION GRANTED.

PRATT v. CANFIELD, *Appellant.*

Linn County Court of Common Pleas; APPEAL: SUPERSEDEAS BOND: STAY OF EXECUTION. By the act establishing the Linn county court of Common Pleas, (Sess. Acts 1867, p. 93), the circuit court is invested with appellate jurisdiction in cases arising in the common pleas, but it is provided that no appeal to the circuit court shall operate a stay of execution or other proceedings in the common pleas. A defendant having appealed from the judgment of the latter court to the circuit court, and from a judgment of affirmance there to the Supreme Court, gave a supersedeas bond to stay the execution of the judgment of the circuit court, as provided by the general law in relation to appeals, (Wag. Stat., p. 1069, § 45). Pending this appeal the plaintiff caused an execution to issue from the common pleas on the judgment there. On motion to quash, *Held*, that plaintiff was not entitled to the execution until the determination of the appeal in the Supreme Court.

Appeal from Linn Court of Common Pleas.—HON. THOMAS WHITAKER, Judge.

Charles L. Dobson for appellant.

S. P. Huston for respondent.

HENRY, J.—The plaintiff obtained a judgment in the Court of Common Pleas of Linn county, from which defendant appealed to the circuit court of said county, where said judgment was affirmed, and defendant prosecuted an appeal to this court, and pending the cause in this court, plaintiff caused an execution to issue from the Common Pleas Court on the judgment there. Defendant filed his motion in said Common Pleas Court to quash said execution, which the court overruled, and from the judgment of the court overruling said motion, defendant has appealed to this court.

By section 15 of the act establishing the Linn County Court of Common Pleas, (Sess. Acts 1867, page 94) it is provided that "the circuit court of Linn county shall have superintending control over the said Common Pleas Court,

and appellate jurisdiction from its final judgments and decisions, by appeal or writ of error, which shall be allowed and prosecuted in the same manner, and with the effect prescribed by law in cases of appeal, or writ of error from the circuit to the district court, but no appeal shall in any case operate as a supersedeas, or stay of execution, or other proceeding on the judgment or decision of said Court of Common Pleas." By the 5th section of the act, appeals or writs of error were also allowed from that court to the district court. The party who felt aggrieved by, could appeal from the judgment of that court, either to the circuit or district court, and now to the Supreme Court.

Plaintiff's counsel contend that under the 15th section plaintiff had a right to an execution, notwithstanding the appeal from the judgment of the circuit court to this court. Section 45, page 1069, Wag. Stat., provides that upon an appeal being made, the circuit court shall make an order allowing the appeal, and the allowance thereof shall stay the execution when the appellant or some responsible person for him together with two sufficient securities, to be approved by the court, shall, during the term, at which the judgment appealed from was rendered, enter into a recognizance to the adverse party, &c. This provision was complied with when the defendant appealed from the judgment of the circuit court, and that entitled him to a stay of the execution on the judgment of the Court of Common Pleas. There w no other execution to stay. The circuit court, if its judgment had not been appealed from, could have issued no execution, but would have remanded the cause to the Common Pleas Court, which would then have proceeded to enforce its judgment. Counsel ask "how is the Common Pleas Court to take judicial notice of the appeal from the circuit court to the Supreme Court?" The answer is, not at all, but the plaintiff who sues out the execution is necessarily aware of the appeal, and when the motion to quash was made, the Common Pleas Court was made acquainted with that fact in a legal manner, and

should have quashed the execution. That the court had no notice of the existence of a fact which deprived the plaintiff of the right to an execution, and of which he was fully aware, is no reason why, when the knowledge of that fact was regularly and legally communicated to the court, the court should continue in being its process of which an improper use was sought to be made. If a defendant pay off a judgment and afterwards the plaintiff cause an execution to issue on the judgment, will it be contended that because the court cannot take judicial notice of the payment of the debt, it cannot quash the execution when the fact is made to appear? The court can always quash its process when improperly issued, whether the facts which show that it was improperly issued appear upon the record or be disclosed by evidence.

The judgment is reversed and the costs of this appeal adjudged against the plaintiff in the execution. All concur except SHERWOOD, C. J., not sitting.

REVERSED.

PRATT v. CANFIELD, *Appellant.*

Vendor and Purchaser: LANDLORD AND TENANT: ADVERSE POSSESSION. One who holds land under a contract of purchase cannot, by accepting a lease from a stranger, convert his holding into an adverse possession as against his vendor; and if one so holding abandons the land and afterwards re-enters under a lease from a stranger without having rescinded his contract, and without any one having in the meantime taken possession, his re-entry will be held to relate back and continue the original possession, and not to create a new and adverse possession.

Appeal from Linn Circuit Court.

W. H. Brownlee for appellant.

S. P. Huston for respondent.

HENRY, J.—The plaintiff, Pratt, sued the defendant in the Common Pleas Court of Linn county, to enforce the specific performance of a contract between the parties, by which plaintiff sold and defendant purchased the n w qr. of section 14, township 57 of range 21, in Linn county, Missouri.

The contract was in writing. The price agreed upon was $1,280, to be paid in three payments, the first of which $640, was to be made on the 1st day of January, 1871, and the balance in two equal annual payments, one on the 1st day of April, 1872, and the other on the 1st day of April, 1873, both to bear interest from April 1st, 1871, at seven per cent. per annum. On payment of $640 on the 1st day of January, 1871, Pratt was to execute and deliver to defendant a general warranty deed, conveying to him the said land, and to deliver to him possession of the land "on the 1st day of March, 1871, or as soon thereafter as plaintiff could arrange to do so." Plaintiff alleged that he had always been, and still was ready and willing to perform said agreement on his part, and to deliver to defendant possession of said land at the time specified in said agreement; that on the 1st day of January, 1871, and at divers times since, he tendered to the defendant his general warranty deed conveying to defendant said land, but defendant refused to accept it and pay the purchase money, or any part of the same, and again tendered said deed in court for the defendant, asking a specific performance. Defendant in his answer admitted the contract as alleged by plaintiff, but denied that plaintiff had a title to the land, alleging that one H. Degraw and Harry Lander were the owners of the land and had sued plaintiff for the same, and that said suit was then pending in this court on appeal from the Linn county circuit court; denied that plaintiff ever tendered him a deed for the land, or that it was at any

time in his power to make defendant a deed according to the terms of the contract; claimed by way of recoupment, if the court should decree a specific performance, damages for 500 valuable timber ties of the value of $500, which he charged plaintiff with having cut down and converted to his own use, and asked for a rescission of the contract. The replication denied the new matter set up in the answer. In the Common Pleas Court, at the August term of said court, held in September, 1874, there was a trial of the cause and the court rendered a decree as prayed in plaintiff's petition, from which defendant appealed to the circuit court of Linn county, where it was affirmed, and from that judgment he has appealed to this court.

The evidence of plaintiff's title was a patent from the government of the United States, for the land in question to Abraham Smith, dated June 8th, 1819, a deed from said Smith to Levi F. Stephens, conveying said land to said Stephens, and a deed from said Stephens to plaintiff, dated 21st day of October, 1859. There was no evidence of title in Degraw and Lander, or either of them, or any one else except Pratt, unless the facts hereinafter stated showed an adverse possession of ten years in Degraw under color of title. Although the tract is military bounty land, ten year's adverse possession by Degraw would, under our statute, be necessary to defeat Pratt's title, Pratt's right of entry having accrued before the passage of the act of 1866. *Neilson v. The County of Chariton et al.*, 60 Mo. 386. If Degraw had an adverse possession it commenced in 1865 or 1866. The evidence on this point showed that in 1860, Pratt, by a contract in writing, sold the land to one Morrow, who took possession of the land, made improvements and remained in actual possession until 1864. About that time he moved off the land and was absent from the State for twelve months. He then returned and again went into possession of the land—Degraw says in his testimony under a lease from him. He continued in possession until about the 29th of July, 1870, when the contract between

him and Pratt was, by an agreement in writing, rescinded. The following is a copy of the rescinding agreement: "Memorandum of an agreement by and between Isaac V. Pratt, of the first part, and Samuel Morrow, of the second part, witnesseth, the said Morrow hereby surrenders the possession received from the said Pratt on the 6th day of November, 1860, and held under contract of purchase, &c., to this date, of the northwest quarter of section No. fourteen, in township No. 57, north, and range No. twenty-one west, and in consideration of such possession, said Pratt hereby rescinds said contract of purchase, and agrees to let Michael Baker have the corn now growing on the land and till March 1st, 1871, to take the same off the land." This agreement was signed by both parties. Degraw never had actual possession of the land unless the possession of Morrow, under a lease from Degraw, was such possession. It is not pretended, nor is there any evidence, whatever, that any one, except Morrow, was in actual possession of the land from 1860 to 1870, when he rescinded his contract with Pratt. Could he, while in possession as a purchaser from Pratt, by accepting a lease from Degraw, convert possession into an adverse possession against Pratt?

"The rule of law that a person coming into possession of land under the agreement or license of another, cannot be permitted to deny the title of the latter, when called upon to surrender, is of almost universal application. Even if he had a valid title at the time, he is deemed to have waived it, and as between the parties, to have admitted title in the person under whom he entered." Tyler on Eject. and Adverse Possession, 166; *Jackson v. Ayers*, 14 John. 224. "And a claim of title which cannot be set up by a person while in possession, cannot be set up by another person who comes into possession under him." Tyler on Eject. and Adv. Possession, 166; *Jackson v. Harder*, 4 John. 202; *Jackson v. Bard*, Ib. 230; *Jackson v. Walker*, 7 Cow. 637. In *Jackson v. Harder*, Chancellor Kent observes: "This brings us then to this point of inquiry whether a

claim or title residing in Baker, and which he could not have set up while he was in possession, can be permitted to be set up by another person who succeeds Baker to the possession, and probably by collusion with him. I am clearly of opinion that this ought not to be permitted, and that it would be inconsistent to permit the defendant to protect himself by a claim or title in Baker, which Baker himself could not have set up had he remained in possession." If, after a rescission of the contract, without any agreement on the part of Morrow to re-deliver possession of the premises to Pratt, Morrow had continued in possession, and refused to give Pratt possession, will it be contended that he could have successfully defended himself against an action of ejectment by Pratt by proving title in Degraw, and a lease from Degraw to himself? So if he had delivered possession to Degraw instead of accepting a lease from him, Degraw would have stood in his shoes and held the land under Pratt. There was, therefore, no adverse possession shown by the evidence against Pratt, but on the contrary a continuous, actual, uninterrupted possession by Pratt for a period of ten years, and still continuing so far as the testimony shows.

The evidence conclusively proved a tender of the deed by Pratt to Canfield; Canfield himself testified to that fact, and that he refused to receive it, unless Pratt would also give him a bond with security to indemnify him. He testified also that he not only declined to accept the deed, except upon the condition of receiving a bond of indemnity, but that he refused to rescind the contract which was proposed by Pratt, and he also stated that he had a contract with Degraw for the purchase of the land. Counsel for defendant contend that a court will not decree a specific performance of a contract in favor of a vendor whose title is doubtful, and that the fact that a suit is pending here in which Degraw and Lander are plaintiffs against Pratt to recover this land, should prevent an affirmance of the judgment. The authorities cited to establish the prop-

osition that a court of equity will not compel a vendee to accept a doubtful title and pay the purchase money, fully sustain that position; but in this case there is nothing in the evidence which raises a doubt of Pratt's title. The case of Degraw and Lander against Pratt, was tried in the circuit court of Linn county before this case was tried there, and if defendant did not introduce all the evidence in this cause, tending to prove title in Degraw and Lander, it was his fault. We must decide this case upon the record before us, which shows a perfect title in Pratt, and no reason whatever why defendant should not be compelled to perform his contract. Degraw says in his testimony that Morrow, in 1864, sold his improvements, abandoned the land and left the State, but returned in about a year, and again went into possession under a lease from him. There is no evidence that Pratt knew that he had abandoned the land, or that he afterwards entered under a lease from Degraw, and there was nothing to show that Morrow was not still in possession under his contract with Pratt.

But we place Pratt's right upon the broad ground that Morrow, having once taken possession under his contract with Pratt, although he may have afterwards abandoned it, yet if no one else took possession, his subsequent entry, whether under a lease from Degraw or not, related back to and continued the original possession obtained from Pratt. His abandonment of the possession of the land was not a rescission of the contract of purchase; it did not alter the relation of vendor and purchaser betwixt him and Pratt; it did not effect a change of possession in law. He or Pratt was still in possession, and he could not, while the contract between him and Pratt was in full force, enter upon the land under a contract with or lease from another and hold it adversely to Pratt. If he could not, then there is not, so far as the record shows, a shadow of doubt that Pratt's title is perfect. Not only was there no adverse possession in Degraw for ten years, but he never

was in possession adversely to Pratt for any length of time whatever.

All concurring, except SHERWOOD, C. J., absent, the judgment of the Common Pleas Court is affirmed.

AFFIRMED.

WALTON v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RWY. CO., *Appellant.*

1. **Railroads**: FENCES: FORTY-THIRD SECTION. A railroad company is not liable in double damages under the 43rd section of the railroad law, (Wag. Stat., p. 310,) for cattle killed at the crossing of a private road, or at a point where the railroad runs through uninclosed timbered lands or through uninclosed lands from which the timber has been taken, although such lands are but a narrow strip on each side of the road, and the next adjoining lands to them on each side are enclosed fields. (*Robinson v. C. & A. R. R. Co.*, 57 *Mo.* 494, *distinguished and criticised.*)
2. **A Private Road** is a public highway within the meaning of section 5 of the damage act. (Wag. Stat., p. 520.)

Appeal from Washington Circuit Court.—HON. LEWIS F. DINNING, Judge.

Thoroughman & Warren with *W. R. Donaldson* for appellant, cited *Tiarks v. St. L. & I. M. R. R. Co.*, 58 Mo. 45; Wag. Stat., p. 520, § 5. A highway may become such by use and prescription, and there was evidence to show that the road in this case was in use for over thirty years.

Reynolds & Relfe for respondent.

There was no highway, but merely a lane through Evans' farm, which he kept open or closed as he chose for his own convenience. Under section 43, it was appellants' duty to erect fences there, and, if Evans wanted to use it as a farm crossing, to erect cattle guards on both sides of

the crossing with bars and gates for his use. Where the ox was killed, the road certainly ran between an inclosed pasture on the south 60 feet distant, and an inclosed cultivated field on the north from 200 to 300 feet distant. Surely section 43 is applicable to such a state of facts. *Slattery v. St. L., K. C. & N. Railway Co.*, 55 Mo. 362; *Robinson v. Chicago & A. R. R. Co.*, 57 Mo. 494; *Nall v. St. L., K. C. & N. Railway Co.*, 59 Mo. 114.

Hough, J.—This was an action under the 43rd section of the act in relation to railroad companies. The petition contained two counts: one for killing an ox in 1870, the other for killing a heifer in 1874. At the place where the ox was killed, the railroad runs east and west, and crosses at right angles a private road which had been used by the public for fifteen or twenty years. East of this private road, the railroad was fenced. The private road was not fenced, nor was there any fence (for some distance) west of said road. On the north side of the company's right of way, and immediately west of the private road, in or near which the ox was killed, there was a strip of land between three and four hundred feet in width, which was uninclosed timbered land, partly cleared. Bounding this strip on the north was an inclosed field. On the south side there was a similar strip of cleared land from sixty to one hundred feet in width, separating the right of way of the defendant from an inclosed woodland pasture. The foregoing facts are undisputed.

It is clear that the railroad company could not lawfully fence the private road at its intersection with the railroad. Though a private road it was by statute free to be traveled by all persons as a public road. Wag. Stat., Vol. 2, p 1233, Sec. 10. A private road is a highway, a "public highway," within the meaning of the 5th section of the Damage Act. The phrase "public highway," is a tautological expression. A highway is a passage, road or street, which every citizen

1. RAILROADS: fences: forty-third section.

has a right to use, and is therefore necessarily public. Bouviers Dict. The road in question was a highway, and could not be fenced by the defendant. "Private roads" are so termed by the statute to distinguish them from public roads, which are maintained at the public expense.

Nor did the statute impose any obligation to fence the lands lying immediately west of the road. The lands through which the railroad passed at that point were uninclosed timbered lands, or lands from which the timber had been taken. The lands adjoining the right of way of the defendant, and on both sides thereof, were, as shown by the statement, the same. The words "along" and "adjoining," are used in the first part of section 43 as synonymous terms. This is manifest from the immediate context, and from the use of the word "along" in the same connection in a subsequent part of the same section, without the word "adjoining." Both words as used in this section of the statute, imply contiguity, contact. It is true, there were inclosed fields lying to the north of the railroad, and inclosed fields lying to the south of the railroad, but the road did not run through such fields, nor did its right of way adjoin them; and therefore it was not required to erect or maintain fences at such place, and cannot be held liable in double damages. If the ox was not killed upon the highway, the defendant might have been held liable for single damages, in a timely suit brought under the 5th section of the Damage Act. *Tiarks v. The I. M. R. R.* 58 Mo. 45; *Edwards v. H. & St. Jo. R. R.*, *ante* p. 567. The case of *Robinson v. Chicago & Alton R. R.*, 57 Mo. 494, is not in point. That action was not brought under the 43rd section of the corporation law, but for single damages only, and the company was held liable without any proof of negligence, as it did not fence, for it might lawfully have erected a fence. The judgment was right, but the reasoning is open to criticism. Besides, the court in that case, seem to have misapprehended the true character of the Indiana Statute, on which, and the decis-

2. PRIVATE ROAD.

ions made thereon, its reasoning was based. That statute is wholly unlike our 43rd section, which is the only provision to be found in our laws requiring fences to be built; but it conforms more nearly to the 5th section of our Damage Act.

For the foregoing reasons the judgment must be reversed, and the cause will be remanded. The other judges concur.

REVERSED.

THE STATE v. BUTLER, *Appellant.*

1. **Larceny**: IMPORTING GOODS STOLEN IN ANOTHER STATE: CONSTITUTIONAL LAW: WITNESS. Section 3, p. 511, Wag. Stat., which provides that a person who shall bring into this State property stolen in another, shall be punished in the same manner as if the theft had been committed here, is not in conflict with that provision of the constitution which guarantees to the accused compulsory process for his witnesses. That provision has reference only to such process as the State can execute within her own borders. The fact that the witnesses may be beyond the reach of her process can be no obstacle in the way of conviction.
2. **New Trial**: DEPOSITIONS IN CRIMINAL CASES. The fact that a witness for the defense, who resides beyond the limits of the State, is absent from the trial, is no ground for a new trial in a criminal case, when no effort has been made to obtain his deposition; neither are acts of intimidation practiced upon witnesses after they have given their testimony, nor newly discovered evidence which is merely cumulative or calculated to impeach or discredit a witness who has sworn at the trial.

Appeal from Jackson Criminal Court.—HON. HENRY P. WHITE, Judge.

Kemp & Collier for appellant.

1. Sec. 3, p. 511, 1 Wag. Stat., is unconstitutional. The 14th amendment to the federal constitution, and sec-

tion 2, article 4 of said constitution prohibits such legislation in the State. At common law, the citizen could not be put more than once in jeopardy for the same offense, and this principle has been ingrafted into the constitution of every State and the federal government. Section 22, bill of rights, constitution of 1875, guarantees to every citizen the right to meet the witnesses against him face to face, and to have process to compel the attendance of witnesses in his behalf. A statutable crime of larceny has been created in violation of the State and federal constitution. *State v. Orr*, 64 Mo. 339; 4 Whart. Am. Crim. Law, pp. 185, 168; 7 Cal. 395; Meigs' Rep. 195; *State v. McO'Blennis*, 24 Mo. 402; *Maryland v. McCulloch*, 4 Wheat. 316; *Ableman v. Booth*, 21 How. 506; 1 Kent Com., (8 Ed.) p. 190; *State v. Comfort*, 5 Mo. 357; *U. S. v. Clayton*, 2 Dillon C. C. 219.

2. The character of the proceedings was a surprise upon defendant and his counsel, and, under the law, entitles him at least to a new trial. *State v. Arter*, 65 Mo. 653.

J. L. Smith Attorney-General, for the State.

A person committing a larceny in one State can be indicted and punished therefor in another State, into which he has brought the stolen property. Sec. 3, p. 511, Wag. Stat.; *People v. Williams*, 24 Mich. 156; *State v. Hemmaker*, 12 Mo. 453; *State v. Williams*, 35 Mo. 229; *State v. Bennett*, 14 Iowa 479; *Hamilton v. State*, 11 Ohio 435; *Watson v. State*, 36 Miss. 593. And if this indictment had alleged the stealing in Johnson county, Kansas, and the bringing of the stolen property into Jackson county, Missouri, as defendant insists it should have done, it would have been bad. *Johnston v. State*, 47 Miss. 671; *People v. Mellon*, 40 Cal. 648.

2. It is of no consequence that defendant could not have compulsory process for the witnesses residing out of

the State, as he could have taken their depositions. Sec. 11 *et seq.* p. 1096, 2 Wag. Stat.

3. The motion for a new trial, and affidavits in support thereof, are without merit. *State v. Carr*, 1 Fost. (N. H.) 166.

SHERWOOD, C. J.—The defendant, indicted and convicted of stealing a horse, appeals to this court.

I. The chief point urged upon our attention is the unconstitutionality of the statute under which the defendant was indicted. The substance of that statute is, that persons obtaining property in another State or county, by theft or robbery, and bringing such property into this State, may be indicted and punished for larceny in any county in this State, into or through which such property may be brought, in the same manner as if the property had been feloniously taken or stolen in this State. (1 Wag. Stat., 511, § 3.) The constitutionality of this statute was affirmed by this court some twenty-nine years ago, in the case of *Hemmaker v. The State*, (12 Mo. 453). In the *State v. Williams*, (35 Mo. 229,) although the constitutional validity of the act was not discussed, yet it was said there that whether larceny committed in another State could be punished in this, did not arise, since the statute made it a punishable offense to bring stolen property into this State. The Supreme Court of Michigan has held a similar statute valid. The *People v. Williams*, (24 Mich. 156). In Ohio, (*Hamilton v. State*, 11 Ohio 435), Iowa, (*State v. Bennett*, 14 Ia. 479,) and Mississippi, (*Watson v. State*, 36 Miss. 593,) it is held that by the common law, and independent of statutory provision, where property is stolen in one State or jurisdiction, and brought into another, it is a new, fresh and distinct larceny. The case cited from Mississippi, considers the authorities and discusses the question with distinguished ability, showing that the great current of authority gives recognition to the view just noted. But, as shown in *Hemmaker v. State, supra*, we are relieved of any

necessity of discussing the common law rule, as our statute has made the offense with which the defendant stands charged, punishable as larceny, and this is sufficient for us. If the defendant, by bringing stolen property into this State, has rendered himself amenable to our laws, it is a matter of no concern to us, nor justification to him, that he had elsewhere, and in another jurisdiction, committed a separate and distinct felony respecting the same subject matter. And if we accept the evidence as true, and the verdict based thereon as correct, he has done this, whether regard be had to our statutory rule, or that of the common law. At the present term of the court we held that our statute allowing conviction for larceny in the county into which the stolen property was brought from another county in this State, was but declaratory of the common law that the bringing of stolen property into such county, was larceny in the latter, (*State v. Smith*,) and we there further held, that the indictment properly charged the larceny as done in the county where the thief was taken with the property. As to that provision of the constitution which allows the accused to have compulsory process for witnesses, we discover not the slightest antagonism between that and the statute under consideration. It is of frequent occurrence in criminal prosecutions, that witnesses are beyond the reach of compulsory process of that jurisdiction where the prisoner is arrested, and yet this is never deemed to be an obstacle in the way of ultimate conviction. If it were, many a felon would escape punishment altogether. That constitutional provision has evident reference to only such process as the State, where the prosecution is had, can execute within her own borders. If the argument that defendant cannot be tried but where he can have compulsory process for his witnesses, be sound, then when taken to Kansas to be tried for the original larceny, precisely the same difficulty would be encountered, for on arrival there, the State of Kansas would possess no power to execute criminal process within our borders for defendant's wit-

nesses resident in this State; so that the result would be the defendant could not be tried at all. The bare statement of such an argument, and the results which would flow from its being successful, constitute and accomplish its ample refutation.

II. The principal witness, Edward Young, resides in Kansas City, and he it was whose testimony identified the prisoner; and that the horse was stolen in Kansas and brought into Jackson county, is abundantly established. The prisoner's own testimony is unsatisfactory and somewhat contradictory, and notwithstanding his attempted proof of an *alibi*, we think now, as we did when applied to for a *supersedeas*, that the testimony was sufficient, the cause fairly tried and the verdict should not be disturbed.

III. As to the motion for a new trial based upon newly discovered evidence, it is sufficient to say that it discloses not the slightest attempt at diligence. Although witnesses in Kansas could not be reached by our process, yet under the statute, their depositions could have been taken. (2 Wag. Stat. 1096, § 11, *et seq.*) But no effort in this direction was made. The defendant, too, as well as his father, must have been as conversant with the hostile feelings of some of the witnesses towards him before, as after the trial. And as to any intimidation, it seems to have occurred after the trial, and against those who had already testified. Besides, the testimony was merely cumulative, and its effect would have been merely to discredit or impeach a former witness. (*State v. Carr*, 1 Fost. N. H. 166; *Richardson v. Farmer*, 36 Mo. 35; *State v. Ray*, 53 Mo. 345, and cases cited.) As to the affidavit of John Butler, the father, he only speaks of a witness whose name he does not give, who resides in Johnson county, Kansas, who, if present, would only have sworn to good character. When this witness was called upon, does not appear; nor is the affidavit of the witness produced. (See authorities above cited.) In addition to the above, both defendant and his father could have testified to his good character,

which was not done, and if done, would not have availed anything, if the jury regarded the evidence of defendant's guilt as clear. We discover no error in the record, and affirm the judgment. All concur, except Hough, J., who was not present at the argument.

AFFIRMED.

STATE *ex rel.* MCGRATH v. HOLLADAY, *State Auditor.*

Constitution of 1875: EXECUTIVE DEPARTMENT: STATE BOARD OF EQUALIZATION: COMPENSATION OF ITS MEMBERS. Under the State constitution of 1875, officers of the Executive Department are not entitled to any compensation for services rendered by them as members of the State Board of Equalization.

Mandamus.

Edwin Silver for relator.

J. L. Smith, Attorney General, for respondent.

HENRY, J.—By an act of the General Assembly, approved March 30th, 1872, the members of the State Senate and the Lieutenant Governor were constituted a State Board for the equalization of the valuation of real and personal property among the several counties in the State, and their compensation fixed at the same sum *per diem* as was allowed members of the General Assembly, which was five dollars per day. Section 1, article 5 of the constitution provides that "the Executive Department shall consist of a Governor, Lieutenant Governor, Secretary of State, State Auditor, State Treasurer, Attorney General and Superintendent of Public Schools, all of whom, except the Lieutenant Governor, shall reside at the Seat of Government during their term of office, and keep the public records, books and papers there, and shall perform such

duties as may be prescribed by law." Section 24, of the same article, provides that "the officers named in this article shall receive for their services, a salary to be established by law, which shall not be increased or diminished during their official terms; and they shall not, after the expiration of the terms of those in office at the adoption of this constitution, receive to their own use any fees, costs, perquisites of office or other compensation. All fees that may hereafter be payable by law for any service performed by any officer provided for in this article, shall be paid in advance into the State Treasury."

The 18th section, of the 10th article, constitutes the Governor, State Auditor, State Treasurer, Secretary of State and Attorney General, a State Board of Equalization, requiring them to adjust and equalize the valuation of real and personal property among the several counties of the State, and to perform such other duties as were then, or might thereafter be prescribed by law.

These are all the provisions to be found on the subject in the constitution or the statutes, and the question for consideration on this application for a mandamus is, are the members of the Board of Equalization, as at present constituted, entitled to the compensation which was allowed the members of the board under the act of 1872? Among the officers named in the 5th article of the constitution, are those who compose the State Board of Equalization, and the terms of those now in office, all commenced since the adoption of the present constitution. Membership of that board is not an office which either of the members can decline without resigning his principal office. They are ex-officio members of the State Board of Equalization, and as Governor, Secretary of State, State Auditor, State Treasurer and Attorney General, bound to discharge the duties imposed upon them as such officers. By the 24th section of article 5, they are not entitled to receive any fees, costs, or perquisites of office, and if nothing more had been added, the argument would prevail, that

those terms applied strictly to fees, costs and perquisites of office, legitimately connected with the duties of their respective principal offices; but the words "or other compensation," have a broader significance. They mean more than is embraced in the terms "fees," "costs," "and perquisites of office;" nor do they apply to an increase of salary. The first clause of the section provides against such increase by declaring that they "shall receive for their services a salary to be established by law, which shall not be increased or diminished during their official terms."

The meaning of the constitutional provision we take to be, that for any duties imposed upon them as executive officers, they shall receive no compensation except the salary established by law. That the duty of serving as members of the Board of Equalization is imposed upon them respectively as executive officers is clear, if they are not at liberty to decline the performance of that service, and that they cannot is placed beyond controversy by the first section of article five, which requires them respectively to perform such duties as may be prescribed by law. The relator contends that, as the constitution requires the General Assembly to establish a salary for each of these offices, and it has failed to do so, they are entitled to the compensation which was allowed for services required of them, when the constitution was adopted. Salaries for these offices were established by law when the constitution was adopted, and the constitution continued them as established until otherwise provided by the General Assembly, and the provision of the constitution is imperative, that "after the expiration of the terms of those in office, at the adoption of the constitution," the officers named, shall receive no other compensation than the salary. That provision requires no legislation to give it effect. It were an easy matter to evade that constitutional provision, if these sections admitted of any other construction than that which we have given them. Additional duties to those now required might be imposed upon them and a compen-

sation allowed exceeding the amounts of their several salaries. The next General Assembly might make them Commissioners of the Permanent Seat of Government, or commissioners to superintend the erection of some public building, and allow them for their services, as such, salaries exceeding those allowed them as executive officers; could the Legislature do this without violating the constitution? If so, the constitutional provision is worthless and without meaning. The provision that "all fees that may hereafter be payable by law for any service performed by any officer provided for in this article, shall be paid into the State Treasury," is somewhat obscure, and it might be argued, that the fees to be paid into the State Treasury, are such as are allowed for services provided for in that article, but the words "provided for in that article" relate to the officers named therein, and not to the services performed by such officers. The duties of neither Treasurer, Superintendent of Public Schools, Auditor or Attorney General are prescribed in that article, and the provision we are considering would have no application to those officers, if the words "provided for," &c, are to be regarded as relating to the services prescribed, and not the officers provided for in that article. We think that, as a member of the State Board of Equalization, relator is entitled to no compensation for his services, and peremptory writ therefore is refused. All concur, except NORTON, J., dissenting, and SHERWOOD, C. J., not sitting.

PEREMPTORY WRIT REFUSED.

HOUGH, J., CONCURRING.—The 4th section of the 5th article of the constitution, provides that the officers named in said article, among whom is the relator, shall receive, for their services, a salary to be established by law, which shall not be increased, or diminished, during their official terms; and they are not allowed to receive any fees, costs, perquisites of office, or other compensation. That is, they shall receive no other compensation than the salary estab-

lished by law. No other compensation for what? For their services. For what services? For their services as such officers. Why did the relator render the service for which he now seeks special compensation? Because he was Secretary of State, and the constitution says the Secretary of State shall render such service. It being the duty of the Secretary of State to render such service, it is wholly immaterial that in rendering it, he acted as a member of the Board of Equalization. The constitution makes it his duty to act as a member of that board. This duty is not devolved upon M. K. McGrath, but upon the Secretary of State, whoever he may be. It is a duty attached to the office, and therefore it is an official duty; and for the performance of his official duty, the Secretary of State is entitled to no other compensation than his salary. The service rendered by the relator with other officers in adjusting and equalizing the valuation of real and personal property among the several counties in the State, is, it must be conceded, an important one; one for which the convention that framed the constitution might very appropriately have authorized the Legislature to provide special compensation. But that body evidently thought that the Legislature would provide salaries for these officers which would afford adequate compensation for all the services which they were required to render to the State. How else could it have happened that in constituting the Governor, Secretary of State and other officers a Board of Equalization in lieu of the board previously composed of State Senators, they simply provided that they should perform such duties as were then, or should thereafter be, prescribed by law, but did not say that they should receive the same compensation theretofore provided by law for the senators, when acting as a board, or that they should receive such compensation as the Legislature might provide, or indeed any compensation whatever. It is a significant fact that the Legislature has not undertaken to provide any compensation for these officers, when acting as a Board of

Equalization; and it is plain to my mind, that the compensation provided for the senators when they performed this service, cannot be transferred by implication to the executive officers now composing the board, even though there were no constitutional inhibition in the way. By the 7th section of article 4 of the constitution, it is provided that in the event the General Assembly shall fail, or refuse to district the State for senators, as therein required, it shall be the duty of the Governor, Secretary of State and Attorney General, within thirty days after the adjournment of the General Assembly on which such duty devolved, to perform said duty, and to file in the office of the Secretary of State a full statement of the districts formed by them, which statement, it is provided, shall after certain prescribed formalities, be as binding and effectual as if done by the General Assembly. Would it be pretended that the officers named, in rendering such service, would not be acting in their official capacity, because they would, for the time being, exercise the functions of the Legislature, and would they, while engaged in the performance of such duty, be entitled to the *per diem* allowed by law to the members of the Legislature? Is is not plain that this duty though legislative in its character, is imposed upon them as executive officers, and that they cannot claim any additional compensation therefor? Undoubtedly, any of the executive officers named in the 5th article of the constitution, may for any service of a private and unofficial character, receive such compensation as may be agreed upon between them and the persons employing them, but for any service which they are required by the constitution to render to the State, they can receive no other compensation than their salaries. I concur in refusing the writ.

NORTON, J., DISSENTING.—Not concurring in the opinion of the court in this case, I deem it not inappropriate to express the reasons for my dissent.

Section 18, article 10 of the constitution provides, "that there shall be a Board of Equalization consisting of the Governor, Secretary of State, State Auditor, State Treasurer and Attorney General. The duty of said board shall be to adjust and equalize the valuation of real and personal property among the several counties in the State, and it shall perform such other duties as are or may be prescribed by law." It has been held by this court that in addition to adjusting and equalizing the value of property, said board are charged with the duty of assessing certain descriptions of property liable to taxation. (*Hannibal & St. Jo. R. R. Co. v. State Board of Equalization*, 64 Mo. 294.)

The questions arising in this case are as follows: Are the members of this board entitled to compensation for the services thus required? If so, is that compensation fixed by law, and if so fixed, is there any existing appropriation made to pay it? The service required of this board is one of great public concern, vitally affecting the revenues of the State, full of responsibility and labor, and in determining the first question presented it is of some moment to look to the state of the law on this subject before the provision above quoted was adopted. Under the acts of 1873, p. 63, the Board of Equalization was composed of the State Senators, in number 34, who received as compensation, five dollars per day, while engaged in the work of the board. This system was an expensive one, and it was deemed wise that it should be superseded by a board composed of a less number, whereby its expenses would be greatly diminished without detriment to the public interests committed to its charge. It was not designed that this work should cost nothing, but simply that its cost should be reduced. That the State ought to pay for such service, and that the people of the State are willing to pay for all needful work which public necessity demands, will not be seriously controverted. It would be an impeachment of their sense of justice to take any other view, and

unless there is some other provision of the constitution which requires this work to be done gratuitously or forbids compensation for it, it may be taken as conceded that the members of the board are entitled to it.

It is claimed that Sec. 24, Art. 5, of the constitution contains this prohibition. It is as follows: "That the officers named in this article shall receive for their services a salary, to be fixed by law, which shall not be increased nor diminished during their official term, and they shall not, after the expiration of the terms of those in office at the adoption of this constitution, receive to their own use any fees, costs, perquisites of office or other compensation. All fees that may hereafter be payable by law for any service performed by any officer provided for in this article shall be paid in advance into the State treasury." This section was manifestly designed to confine the compensation of the officers included in it among whom are the Governor, Attorney General, Secretary of State, Auditor and Treasurer, to the salaries which might by law be established for each respective officer, for all work done by him as such officer. They are not allowed to receive any fee for work done by them as such officers, nor any other compensation for work done by them as such officers. This, I think, is the full scope of the section. If the Attorney General performs all the duties of his office to the full extent of the requirements of the law, and takes a fee as a lawyer for arguing before this court a case between two citizens, no interest of the State being involved, it would not be pretended that he might not rightfully do so, and that the inhibition contained in said section that he should not receive any fee or other compensation, would apply. My view is that the inhibition imposed to receiving any other compensation relates entirely to compensation for services rendered by the respective officers as such officers, in their respective offices. Under this view, unless it can be made to appear that the work for which compensation is claimed by

relator was performed by him as Secretary of State, he is entitled to it.

Although the constitution creates a Board of Equalization and makes five members of the Executive Department component members of it, yet the duties to be performed, and the work to be done, are not enjoined upon them as officers, but as a board, and as such to assess, adjust and equalize the valuation of property, &c. It is neither the act of the Governor, Attorney General, Secretary of State, Auditor or Treasurer, but the act of a board, the work of which is required to be signed by its president and attested by its secretary. Neither the Governor as governor, nor the Secretary of State as such, nor the Attorney General as such, could do this work. It is done by them as a board of assessors, equalizers and adjusters, and the constitution expressly declares that it shall be so done. A senator while acting under the law which required this board to be composed of all the senators of the State, could not be said to be acting in the capacity of senator, but simply as a constituent member of another body, having no legislative duty or function to perform, his right to membership thereof being dependent on the fact of his being a senator, and when he exhibited his title or right to membership in such body his official character as senator was lost or merged in the new duties thus assumed, and in the new relations thus formed. His act could not be said to be the act of a senator, but the act of an assessor invested with power to swear witnesses, hear evidence and adjudicate any disputed question which might arise. Nor can it be said, with any propriety, that the Governor, in acting as a member of said board, was performing an executive duty, or that the law officer of the State was acting as attorney General, or that the Secretary of State was acting in that capacity, or that the Treasurer was acting as such.

The report of the proceedings of the first Board of Equalization under our present constitution supports the

view here presented. The first step taken by the five executive officers named, was to subscribe an oath "that they would faithfully demean themselves in office as the State Board of Equalization, and that they would honestly and impartially assess, adjust and equalize the aggregate valuation of the property of each one of the railroads liable to taxation in the State." Their work was certified to by C. H. Hardin, not as Governor, but as president of the Board. If then, the relator, while performing the service for which he claims compensation, was not performing it as Secretary of State, it follows that he is entitled to pay for it, if the words "other compensation" in section 24 relate only to work done by him as such officer. This I have attempted to show. It is provided, by statute, that the members of the Board of Equalization shall be entitled to the same compensation as members of the General Assembly, hence the amount of compensation is fixed by law.

Has there been an appropriation made applicable to its payment? Acts 1877, p. 12, Sec. 4, provides that there is hereby appropriated out of the Treasury for the purpose of paying the cost of assessing and collecting the revenue, the sum of $280,000. This fund, so appropriated, could be properly drawn upon for the payment of relator's claim, as the revenues of the State are not in condition to be collected until the Board of Equalization complete their work. The relator being entitled to the compensation claimed, and there being an appropriation of money to pay it, has, in my judgment, a right to a peremptory writ compelling the Auditor to audit his account and draw his warrant therefor.

McQUIDDY v. WARE *et al.*, *Appellants.*

Practice in Supreme Court: DEFECT OF PARTIES: AMENDMENT: REMITTITUR. Plaintiffs, as heirs of one who died seized of certain land, recovered in an action of ejectment a larger interest in such land than they were entitled to. Upon appeal, they asked leave of this court to add, as parties plaintiff, the names of other heirs representing the excess of interest recovered; *Held*, that this amendment could not be allowed; that the remedy in such case, where there is no other error in the record, is for plaintiffs to enter a *remittitur*.

Adverse Possession: CONSTRUCTIVE POSSESSION, TENANCY IN COMMON. Where land, of which one was the sole owner in fee, and an interest in other land, of which he was the owner as one of several heirs, was conveyed by the same deed, and the grantee took actual possession of the land first mentioned; *Held*, that this did not give him constructive possession of the interests of the other heirs inthe land last mentioned; and, although he paid taxes upon this land, and took stone and timber off it for building purposes, and made some rails and fed some cattle on it; *Held*, that these acts were entirely consistent with his interest, as a tenant in common in the land, and could not constitute adverse possession as against his co-tenants.

Appeal from Nodaway Circuit Court.—HON. H. S. KELLEY, Judge.

The court, on its own motion, instructed the jury as follows:

1. The patent read in evidence from the United States to John McQuiddy, vested the legal title to the land in controversy in the said John McQuiddy; then, if the jury find, from the evidence, that said John McQuiddy died seized of said land, and that the plaintiffs are the children and grand-children, heirs-at-law of the said John McQuiddy, said plaintiffs have a perfect legal title to the land in controversy, and are entitled to the possession of the same as against the defendants, unless the defendant, John H. Ware, Sr., has acquired title to the same by adverse possession; and if you find for the plaintiffs, you should assess their damages for all waste and injury committed upon the land, and for the rents and profits of the same

during the time defendants have used it, or for not exceeding five years next before the commencement of this suit, and also the value of the present monthly rents and profits. The plaintiffs only claim five-sixths of the land in controversy, and if you should find for plaintiffs you should form your verdict and finding accordingly.

2. The deeds read in evidence by the defendants do not invest the title to the lands in controversy in the defendant, John H. Ware, Sr., but if you find from the evidence that said deeds, or any of them, purport on their face to convey to said John H. Ware, Sr., the lands in controversy, together with other lands purchased by said Ware, Sr., and that all of said land were adjoining and all included in one tract or body, such deed or deeds would constitute a color of title to the lands so included in said deeds; and if you find from the evidence that the defendant took actual, open and notorious possession of a part of said lands, and so included in said deed, and in one lot or body, in good faith, under a claim of title and ownership of the whole of said lands, his possession would extend by construction to all the land embraced in said tract and included in said deed; then, if you find from the evidence that the defendant, John H. Ware, Sr., himself, or by his tenants or agents, has been in open, notorious and continuous possession of said lands, or any part of the same, under such color of title to the whole, claiming the same adversely to said plaintiffs, and said John McQuiddy, their ancestor, in good faith, for ten years or more next before the commencement of this suit, you should find for the defendants.

3. But if the jury find from the evidence that the land in controversy was sold as the land of Thomas J. McQuiddy, in connection with other lands owned by said Thomas, and that said Thomas had no right or title to the land in controversy, except as heir of John McQuiddy, and the said John H. Ware, Sr., knew that said Thomas did not own this land in controversy, then such deed or

deeds to said Ware would not invest any title in said land in him, except as to one-sixth, and would not constitute a color of title so as to enable him to hold constructive possession of the land in controversy by taking actual possession of the other lands included in said deed which were owned by said Thomas J. McQuiddy, and in that case, in order to acquire title to the land in controversy by adverse possession, he, the said Ware, Sr., must have occupied it openly and notoriously under a claim of ownership, in good faith, for the period of ten consecutive years.

4. In determining the nature of defendants' title, and whether the said John H. Ware, Sr., claimed the land in controversy in good faith, adverse to the plaintiffs and said John McQuiddy, under whom they claim, the jury may take into consideration any acts, declarations, statements and admissions shown by the evidence to have been made by the said Ware, Sr., in relation to said land, or the ownership thereof, and the jury may give such weight to any such acts and statements as they may believe they are entitled to; and if the jury believe, from the evidence, that the defendant, Ware, Sr., knew that his supposed title to said land in controversy was worthless as to the claim of plaintiffs, and that the legal title was in John McQuiddy's heirs, and surrendered, verbally, his supposed claim to said land to the heirs of said John McQuiddy, or to Thomas McQuiddy, acting for said heirs, upon the payment to him, said Ware, Sr., of the taxes, costs and penalties for the redemption of the said lands in controversy in this suit, from tax sale, thereby giving the said heirs or their agent to understand and believe that said Ware held no claim on said land, you should find for the plaintiffs.

5. If the jury find, from the evidence, that said Ware, Sr., himself, or by his agents or tenants, have had actual, continuous, visible possession of the land in controversy, claiming the same adversely to the plaintiffs and John McQuiddy, for ten years consecutively before the commencement of this suit, you should find for the de-

fendants. This possession is not constructive, it must have been by occupation or cultivation, if the lands were adapted to actual occupation or cultivation, or by other acts of ownership upon and in relation to said land, which were visible, notorious and continuous for the period of ten years, such as that, if the true owner had visited the land he would have been advised thereby of the claim and possession of said land by the defendants. The fact that Thomas J. McQuiddy may have mortgaged the land, and the said Ware, Sr., and his agents may have put deeds on record, paid the taxes, cut wood and timber on it occasionally, and hauled stone from it, under claim of title, are proper to be considered by the jury in determining the question of the possession and ownership of the lands in controversy. But these facts would not, of themselves, be such possession as would invest the title of the land in the defendant, Ware, Sr., although continued for ten years, under claim of right, unless the land was not susceptible of more definite and actual possession, or unless such acts and claim of owership were known to the said John McQuiddy or the parties holding the legal title, and known by him or them to have been so done under a claim of title or right adverse to his or their title; and the fact that the land may have been timbered land, or the greater portion of it, does not alter the case, if it was adapted to cultivation and improvement or occupation, although it might have been more valuable as timbered land when used in connection with other lands.

John Edwards for appellants.

1. The first instruction given by the court was clearly erroneous. Plaintiffs' several interests amounted in the aggregate to one-third nearly of the land in controversy, and this was all the plaintiffs were entitled to recover under the proof and the pleadings in the case. The court should have so declared. 1 Wag. Stat., Chap. 50, § 10;

Gray v. Givens, 26 Mo. 291. If plaintiffs showed ownership and right of possession to about one-third only of all the land, then defendants, being in possession, were entitled to hold the remaining two-thirds against all persons except the true owner. *Fugate v. Pierce*, 49 Mo. 441; *Griffith v. Schuenderman*, 27 Mo. 412; *Schultz v. Arnot*, 33 Mo. 172.

2. The fifth instruction is not the law as applicable to the facts in the case. The owners of the legal title lived in the State of Tennessee, and may never have had actual knowledge of the possession of defendants. If, however, the acts of ownership of defendants were open, visible and notorious, and done under color and claim of title, they were sufficient in their character, whether defendants knew of them or not. *Scruggs v. Scruggs*, 43 Mo. 142. The instruction seems to imply that the acts of ownership enumerated were not, in themselves sufficient notice of defendants' possession, if the land was susceptible of more definite and actual cultivation, unless such acts were known to plaintiffs. The acts were sufficient to constitute open, visible and notorious possession. (*Menkens v. Ovenhouse*, 22 Mo. 70; *Draper v. Shoot*, 25 Mo. 197; *Ware v. Johnson*, 55 Mo. 500.) The colorable titles of defendant, John H. Ware Sr., being duly acknowledged and recorded, were constructive notice to plaintiffs. (*Crispen v. Hannavan*, 50 Mo. 536.) The latter part of this instruction conveys the idea that the acts of ownership above mentioned must, in order to be sufficient, be known to the plaintiffs, notwithstanding the land was timbered, or the greater part of it, and, on that account, more valuable when used in connection with other lands. In other words, a party claiming by colorable title and adverse possession, must put the land in actual cultivation, and improve and occupy it, even though it might be more valuable to him as timbered land when used in connection with other lands; otherwise, his possession is not sufficient unless known to the true owner. In this respect the instruction was erro-

neous, for it requires more notorious acts of ownership from such claimants than the real owners would exercise over the land. The usual acts of ownership, used in the statute, (2 Wag. Stat., Cap. 89, Art. 2, Sec. 5,) are such only as the true owner would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim. (*Menkens v. Ovenhouse*, 22 Mo. 75.)

Hudgens & Davis for respondents.

1. Defendants having failed to raise the objection to the petition of a defect of parties plaintiff, the objection was waived, and cannot be raised in this court. 2 Wag. Stat., pp. 1014, 1015, Secs. 6 and 10; *Kerr v. Bell*, 44 Mo. 120; *Reugger v. Lindenberger*, 53 Mo. 364; *Boal v. Morgner*, 46 Mo. 48; *Ames v. Gilmore*, 59 Mo. 537.

2. The attention of the circuit court was never, in any manner, at any time, before, during, or after trial, called to the alleged defect of parties plaintiff; and this court will consider no exception to any proceedings in the circuit court, except such as shall have been expressly decided by such court. Wag. Stat., p. 1067, Sec. 32; *S't. B't. Thames v. Erskine*, 7 Mo. 213; *Saxton v. Allen*. 49 Mo. 417; *Russell v. Whitely*, 59 Mo. p. 199; *Curtis v. Curtis*, 54 Mo. 351; *Fickle v. St. L., K. C. & N. R. R. Co.*, 54 Mo. 219.

3. The chief issue upon the trial was, whether the heirs of John McQuiddy, deceased, were entitled to the possession of the premises, as against the defendants, and no error was committed which materially affects the merits of the action, to the prejudice of defendants. (Wag. Stat., 1067, Sec. 32.) Nor affecting the substantial rights of defendants. Wag. Stat., 1034, Sec. 5; *Papin v. Massey et al.*, 27 Mo. 445; *Orth v. Dorshlein*, 32 Mo. 366; *Wells v. Zallee*, 59 Mo. 509.

4. Of the instructions given on the court's own motion, the objection now made by appellants, is founded

upon the alleged defect of parties plaintiff, that as only part of the heirs sued, only part could be recovered, but as any such defect was waived by failure to demur or answer setting up such defect, the objection falls.

5. The 5th instruction directed the jury properly, as to possession not constructive. Such possession should be such as to impart notice thereof to the true owner, upon visiting the land. *Fugate v. Pierce*, 49 Mo. 443; *Musick v. Barney*, 49 Mo. 463; 2 Wash. Real Prop. 494; *Draper v. Shoot*, 25 Mo. 203.

Hough, J.—This was an action of ejectment, instituted at the November term, 1874, of the Nodaway circuit court, by a portion of the heirs of John McQuiddy, for one hundred and sixty acres of land in Nodaway county, of which said McQuiddy died seized, described as follows: The southeast quarter of the northeast quarter, and the northeast quarter of the southeast quarter of section nine, and the southwest quarter of the northwest quarter, and the northwest quarter of the southwest quarter of section ten, township sixty four, range thirty-seven. The defendants claimed title by adverse possession.

John McQuiddy, the ancestor of plaintiffs, died in 1863, leaving six children: Thomas J. McQuiddy, Newton R. McQuiddy, Caroline Newton, George McQuiddy, Mary C. King and Mary E. Wells. The last three named died before suit was brought. Newton R. McQuiddy was not made plaintiff, and during the trial plaintiffs dismissed as to Thomas J. McQuiddy, his interest in the lands in controversy having been sold on an execution against him in favor of Silas Mozingo, November 2nd, 1863; at said sale Silas Mozingo bought said interest, received a deed for the same, and subsequently conveyed it to defendant, John H. Ware, Sr.

George McQuiddy left seven children, six of whom were made plaintiffs. Mary C. King left nine children,

only one of whom joined in the suit. Mary E. Wells left two children, neither of whom were made parties.

Under the instructions of the court the plaintiffs recovered five-sixths of the land sued for. They were really entitled to less than one third. Plaintiffs now ask leave of this court to add, as parties plaintiff, the names of other heirs representing the excess of interest recovered in the court below. This amendment cannot be allowed. The most liberal construction ever placed by this court upon the statute of jeofails, will not justify such a practice. Conveyances may have been made by the parties proposed to be added, or other defenses may exist against them. The remedy in such a case where there is no other error in the record, is for the plaintiffs to enter a *remittitur*.

1. PRACTICE IN SUPREME COURT: defect of parties: amendment: remittitur.

The deed from Mozingo and wife to John H. Ware, Sr., which was dated March 17, 1864, conveyed all the estate of Thomas J. McQuiddy in the land of John McQuiddy, and in two hundred and forty acres of other lands belonging to Thomas J. McQuiddy, lying contiguous thereto. The entire tract of four hundred acres was known as the McQuiddy land. Thomas McQuiddy lived upon his own land from 1856 until 1861, when he removed therefrom and occupied the same by his tenants until March, 1864, when the defendants went into possession, and so continued until the commencement of this suit. The defendants took stone and timber off the land in controversy for building purposes, and paid taxes on it. They also made some rails there, and fed some cattle on it in the winter of 1864–5. With the exception of thirty or forty acres of prairie, the land sued for is timbered and brush land. The prairie land had been fenced by the defendants four or five years before the trial. The remainder of the tract was uninclosed.

2. ADVERSE POSSESSION; constructive possession, tenancy in common.

In March, 1871, Thomas J. McQuiddy, as agent for the heirs of John McQuiddy, repaid to John H. Ware, Sr.,

all the taxes paid by him on the land in controversy, and took from him the following receipt:

"MARYVILLE, Mo., March 21, 1871.

"Received of Thomas J. McQuiddy, agent for the heirs of John McQuiddy, deceased, the sum of twenty-nine and $\frac{24}{100}$ dollars, in full for the taxes, interests and costs on the following described real estate, that is to say: the southwest qr of the northwest qr of section 10, and the northeast qr of the southeast qr of section 9, and the northwest qr of the southwest qr of section 10, all in township 64, of range 37, the same being double the amount of the purchase money, as purchased by John H. Ware, Sr., for the taxes of 1865, 1866 and 1868; also, the sum of seventy-nine and $\frac{79}{100}$ dollars, in full for all subsequent taxes on the above described land, and also to include the southeast qr of the northeast qr of section 9, in same township and range, for all subsequent taxes up to date.

Given under my hand, this 21st of March, 1871.

JOHN H. WARE, SR."

There was testimony showing that Thos. J. McQuiddy had mortgaged a part of the land sued for to Nodaway county, for school money; and there was testimony tending to show that John H. Ware, Sr., told Thomas McQuiddy at, or about the time of the settlement in 1871, that he had no claim upon his father's land, except for the taxes he had paid upon it. Neither the deed from the sheriff to Mozingo, nor the deed from Mozingo to Ware, purported to convey the land in controversy, but only Thomas McQuiddy's interest in the land. By these conveyances Ware became a tenant in common with the plaintiffs in John McQuiddy's land; and it may well be doubted whether the possession by the defendants of Thomas McQuiddy's land, under a conveyance which included also Thomas McQuiddy's interest in John McQuiddy's land, amounted to a constructive adverse possession of John McQuiddy's land. All the acts done by Ware, in connection with the land in suit,

were entirely consistent with his real relation thereto, which was that of a tenant in common, and if actual notice had been given to the heirs of all that the defendants did upon the land, it would not have amounted to notice to them that the defendants claimed their interest in the land, or that he claimed any greater interest therein than was conveyed by his deed. As a tenant in common, he had a right to use the stone and timber upon the land, and it was his duty to pay the taxes; and he had a right to have an account taken of these matters, between himself and his co-tenants, in making a sale, or division of the estate.

In order to present more clearly the precise relations of the plaintiffs and defendants, let us suppose that Thomas McQuiddy had himself sold and conveyed to the defendants, his interest in his father's land, and the fee in his own land, which adjoined it, and that the defendants had entered into the possession of Thomas McQuiddy's land. Would it be pretended that such possession would constitute a constructive possession of the plaintiffs' interest in their father's land? We think not.

There was no actual possession of any portion of the tract sued for until a short time before suit, and the acts of ownership exercised over the land were entirely consistent with the defendants' interest in it.

One circumstance which we have hitherto forborne to mention may now be noticed. At a foreclosure sale under the mortgage made by Thomas McQuiddy of part of this land, Ware became the purchaser of a forty acre tract, but the deed therefor was not put upon record until 1872, and it cannot, therefore, in any manner aid his plea of adverse possession. The settlement made in 1871, of the taxes on the land, with Thomas McQuiddy, as the agent of the heirs, shows very clearly that Ware properly appreciated his rights in the land, and claimed no more than he was entitled to under the deed from Mozingo. The instructions given by the court were much more favorable to the de-

fendants than the views we have expressed would warrant. Certainly no error was committed in them against the defendants. For the error as to the amount of the recovery the judgment will be reversed and the cause remanded, with directions to the circuit court to render a judgment for the plaintiffs for their real interest in the land, upon a *remittitur* being filed for the excess, otherwise to proceed to a new trial of the cause. All concur.

REVERSED.

THE STATE v. PAINTER, *Appellant.*

1. **Assault to kill**: SUFFICIENCY OF INDICTMENT. An indictment for an assault with intent to kill, drawn under the 29th section of article 2, chapter 42, Wag. Stat., p. 449, which alleges that the assault was made with an axe and a gun, and that they were deadly weapons, is sufficient, without the further allegation that they were "likely to produce death."

2. —— There was evidence on the part of the State tending to prove that the defendant and one Andrews were in a blacksmith shop, that defendant went home, a short distance from the shop, and soon returned with a gun lying across his right arm, his left hand being on the cock of the gun, with the muzzle pointed towards the feet of Andrews, and said: "Bill Andrews, I am going to kill you, d—n your old soul;" that the gun was seized by a bystander, and the muzzle forced to the ground after it had been elevated by defendant, so that it was pointed towards Andrews' body, as high as his hips; *Held*, that such facts, if proven, would constitute an assault with intent to kill.

3. **Intent** is an essential element of crime. An instruction, therefore, which declared that, when a crime is committed, the law presumes the intent; *Held*, to be absurd and meaningless.

4. **Presumption of Intent**: EVIDENCE. The fact that one armed with a deadly weapon failed to shoot and kill another, when he had an opportunity, does not give rise to a presumption of law that he did not intend to do so. It is a circumstance to be considered by the jury in determining whether there was an assault or not.

5. **Intent to Assault**. Neither a purpose to make an assault, nor any amount of preparation for doing so, unless followed by some hostile

demonstration, will constitute an assault; a bare intent to commit an offense is not punishable by our law.

Appeal from Douglas Circuit Court.—Hon. J. R. Woodside, Judge.

F. S. Hefferman for appellant.

J. L. Smith, Attorney General, for the State.

Henry, J.—At the October term, 1875, of the circuit court of Douglas county, the defendant was indicted for an assault with intent to kill. The indictment alleged that "John Painter and Elisha Painter, both late of the county of Douglas, at and in the county of Douglas, on or about the first day of August, 1875, feloniously, willfully, on purpose and of his malice aforethought, an assault did make upon one William Andrews, in the peace of the State then and there being with dangerous and deadly weapons to-wit: an axe and a gun being then and there deadly weapons in the hands of the said John Painter and Elisha Painter, then and there held, with the intent him, the said Andrews, then and there to kill and murder, contrary," &c. At the October term, 1877, of said court, there was a trial of the cause, and defendant was found guilty and sentenced to the penitentiary for a term of two years. Motions for a new trial and in arrest of judgment were overruled, and defendant has prosecuted an appeal to this court.

1. Assault to kill: sufficiency of indictment.

There is nothing in the objection to the indictment, that it does not allege that the offense was committed in Douglas county. It is clearly and explicitly alleged that the assault was made in that county. The objections, that it does not allege that the assault was made with malice, that it does not charge, that the defendant made an assault with deadly weapons likely to produce death, and that it does not show that an assault was committed, are equally groundless. The in-

dictment was drawn on the 29th section, and the allegation that the axe and gun were deadly weapons, was sufficient without alleging that they were likely to produce death. That allegation is only necessary when other means than deadly weapons are employed in making the assault. The assault was specifically charged and alleged to have been made on purpose and of malice aforethought.

The evidence on the part of the State was to the effect that William Andrews, on the 25th day of August, 1875, went to the blacksmith shop of defendant's father in Douglas county; that defendant was in the shop mending a shoe, and as soon as he had finished that work he went home a short distance from the shop and soon returned with a gun, and remarked to Andrews: "Bill Andrews, I am going to kill you, d—n your old soul." The gun was then lying across his right arm, with the muzzle pointed towards Andrews' feet, the defendant's left hand being on the cock of the gun. His father immediately left the forge and caught hold of the gun, and forced the muzzle towards the ground; but this was after defendant had elevated the muzzle, so that the gun was pointed towards Andrews' body as high as his hips. The testimony for the defense was that of the defendant and his brother. The latter testified that defendant went to the house and returned with a gun, and said to Andrews: "Wm. Andrews, I heard you said my mother was a yellow-necked b—t—h, and that I was a horse thief; if you said so, we can settle it, if not, you can say so, and I have nothing against you." Andrews said, "I never said it." Defendant then said, "it is all right;" that defendant did not try to shoot Andrews, or say anything about shooting or killing him. Defendant's testimony was substantially the same, with the addition that he said he got the gun to make Andrews retract what he had said, and to prevent being hurt, if Andrews had weapons. We are satisfied that from this evidence the jury was warranted in finding an assault made by the defendant. The authorities cited by the Attorney

General are conclusive, that if the testimony for the State was credited by the jury, it proved an assault. *Bloomer v. State*, 3 Sneed (Tenn.) 66; *State v. Morgan*, 3 Iredell 186; *U. S. v. Myers*, 1 Cranch C. C. 310; *U. S. v. Richardson*, 5 Cranch C. C. 348; *Beach v. Hancock*, 7 Foster (N. H.) 223.

The court, for the State, gave the following instructions: The first was substantially, that if Painter assaulted Andrews with a gun, as charged in the indictment, on purpose and of malice aforethought, with intent to kill him, they should find him guilty. 2. The court instructs the jury that an assault with intent to kill may be made, although there is no striking or shooting. 3. The court instructs the jury that the fact that the defendant and prosecuting witness were on friendly terms immediately after the difficulty sworn to by the witnesses, and have remained so ever since, is no evidence of the innocence of the defendant, but if they believe from the evidence that, at the time the assault was made, the defendant intended to kill said Andrews, they should convict. 4. The court declares the law to be, that the intent of the defendant to kill Wm. Andrews must be gathered from the circumstances and opportunities of defendant to carry into execution such intent, and if the jury believe from the evidence that the defendant attempted to, and was prevented from carrying into execution his intent to kill said Andrews, then the jury should convict. 5. The court instructs the jury that if any witness manifested an interest in the premises, the jury should receive such testimony of the witness who appeared to manifest such interest with caution. 6. The court declares the law to be, that words, no matter how abusive in their nature, or no matter what the prosecuting witness may have said concerning the defendant or any member of his family, will not justify an assault. 8. The court declares the law to be that force is not necessary to prevent one man from assaulting another. 11. The court instructs the jury that when a

crime is committed, the law presumes the intent, and it devolves upon the person charged to show that the unlawful act was done by accident or otherwise. 12. The court instructs the jury that force or words are not necessary to prevent a man from carrying into effect his intent to commit a crime, and if they believe from the evidence that, at the time defendant came to the shop with the gun, he intended to kill the said Andrews, they should convict.

To the giving of these instructions defendant objected, which objection being overruled, he excepted. The 7th instruction was as to the credit the jury might give a witness who had willfully sworn falsely, &c., and was unexceptionable. The 9th properly defined a reasonable doubt, and the tenth correctly told the jury what punishment they might inflict, if they found the defendant guilty.

The instructions for the State were substantially correct declarations of law. The 11th, however, is unmean-
3. INTENT. ing. When proof of a crime is made, there is no necessity for any presumption of intent, for that is an essential element of crime, and crimes are not committed by accident. We have particularly noticed this instruction, because trial courts so frequently commit blunders by multiplying instructions. Why such an instruction was asked or given, we cannot conceive; but it could not have prejudiced the defendant, because it could not have benefitted the prosecution. Nor could it have misled the jury, for it was no direction to them at all, but was simply absurd and meaningless.

For the defendant, the court gave four instructions, and refused the following asked by him: That if at the
4. PRESUMPTION OF INTENT: evidence time of the alleged assault, defendant had an opportunity to shoot and kill Andrews, and did not do so, the presumption is that he did not intend to do so. This instruction was properly refused, because there is no such presumption of law. That he had an opportunity to shoot and kill, and did not, was a cir-

cumstance to be considered by the jury in determining whether there was an assault or not. The 6th asked by defendant and refused, was to the effect, that although defendant took the gun to the shop with intent to settle a difficulty with Andrews, still that fact, of itself, was not an assault unless there were demonstrations to shoot or strike with the gun. The 7th "that although defendant carried his gun to defend himself, in case a difficulty arose, that the fact was not, of itself, an assault."

Neither a purpose to make an assault, nor any amount of preparation for doing so, will constitute an assault, un-
5. INTENT TO KILL. less followed by some hostile demonstration against the person toward whom the purpose is entertained. If the defendant had gone and procured the gun for the express purpose of taking the life of Andrews, but, after coming up with Andrews, made no demonstration toward the accomplishment of that purpose, he would not have been guilty. A bare intent to commit an offense is not punishable by our law. In view of the evidence for the defense, these instructions should have been given. They were unquestionably correct declarations of law, and there was evidence to warrant the court in giving them. The judgment is therefore reversed and the cause remanded. All concur

REVERSED

THE STATE TO USE OF BETTS, *Appellant* v. PURDY

Public Administrator Executing a Will Colore Officii: LIABILITY OF HIS SURETIES. A public administrator being named in a will as executor, without giving bond as such, and without giving the notice required by Wag. Stat., p. 123, § 8, assumed control of the estate devised and executed the powers conferred by the will. The probate court recognized his acts as those of the public administrator. In a suit by a distributee to recover a share of the estate; *Held*, that he was chargeable as public administrator and not as ex-

ecutor or private administrator with the will annexed, and his sureties were liable accordingly.

Appeal from Audrain Circuit Court.—Hon. Gilchrist Porter, Judge.

Ira Hall for appellants.

1. The fact that Purdy called himself executor occasionally, is of no moment, as he never qualified; it is no more than if he had been and called himself a justice of the peace, in connection with public administrator, only it is more easily explainable, being named executor in the will, and, in fact, if administering as public administrator, as charged, he was bound to execute the will, and, so far, was executor in fact.

2. The filing of notice of taking charge of an estate is not indispensable to the validity of the administration, and in this case would be but an additional item of evidence as to the capacity in which he administered. 1 Wag. Stat., Sec. 11, p. 122; Sec. 14, p. 123; *Adams v. Larrimore*, 51 Mo. 131.

3. The question of Purdy's right to administer in this particular case, is not the test of the liability of the sureties. Did he, in fact, or did he profess or assume to administer as public administrator? Of these facts, the papers and records of his administration are the legitimate evidence. *Rollins v. State*, 13 Mo. 437; *State v. Powell*, 44 Mo. 436; *State v. Moore*, 19 Mo. 369; *Miss. Co. v. Jackson*, 51 Mo. 23.

4. A public administrator must alone decide whether he ought to take charge of an estate in all cases, except when ordered to do so by the proper court. And when he does so under a misconception of or in willful disregard of his duty, such mistake or misconduct comes within the scope and purpose of the bond required by statute. *State v. Farmer*, 21 Mo. 160; *State v. Shacklett*, 37 Mo. 280.

5. Appellants were not required, in order to make

out a case, to show that Purdy had the right to administer the estate as public administrator, although there was evidence tending to show it. It was shown that he did not qualify as executor, nor as private administrator of the estate, and the evidence showed that he was professedly in possession of the estate as public administrator, and the presumption of law is, that he was rightfully in possession, rather than wrongfully, as a trespasser. 1 Greenlf. Ev., § 40; 1 Phil. Ev. (4th Am. Ed.) p. 604, note 177, subd. 10; *Stagg v. Green*, 47 Mo. 500; *Phillips v. Stewart*, 59 Mo. 491; *Lamb v. Helm*, 56 Mo. 420.

Thos. H. Musick, M. Y. Duncan, with *T. J. C. Fagg. W. O. Forrist and W. P. Harrison* for respondent.

1. As public administrator, Purdy was only authorized to take charge of the estate in one of the cases specifically designated by the statute. (Gen. Stat. of 1865, p. 516, Sec. 8.) If he took possession in any other way it was wrongful, and his securities are not bound.

2. The papers filed by Purdy, during the time he was pretending to settle up the estate, are not competent as admissions of the principal, to bind the securities, because they did not constitute part of the *res gestae*. To make them competent for that purpose it was necessary to show, first, that the estate of Carbine was properly and legally in the possession of Purdy, as public administrator, and that what he said and did in reference to it was strictly in the line of his official duties. *Northrup v. Miss. Valley Ins. Co.*, 47 Mo. 435; *Blair v. Per. Ins. Co.*, 10 Mo. 559; *Western Boat. Benev. Ass. v. Kribben*, 48 Mo. 37.

3. The undertaking of the security is to be strictly construed, and his liability cannot be extended by implication beyond the terms of his contract. Purdy's settlements do not amount to estoppels as against his securities, and if the court made settlements with him or gave any sort of recognition of his right or authority to take charge

of Carbine's estate in his capacity of public administrator, still his securities would not be bound. *Blair v. Per. Ins. Co.*, 10 Mo. 559; *Nolley v. Callaway Co. Court.*, 11 Mo. 447.

The will gave Purdy authority to sell, he had no authority or power to do so as public administrator, and although in the deeds in evidence, he recites both sources of authority, it is clear that he did not have and could not have had any authority derived from his public administratorship to sell the lands without an order of the court for so doing, together with a report of sale and approval. Then if any legal sale whatever was made, it was under the power in the will which he recites and as executor. Almost all the money which came into his hands, was derived from the sale of lands, and if these sales stand at all, it must be upon the power in the will, and because Purdy, the executor and donee thereof, acted as executor in this administration, for he could not have acted legally as executor in selling the lands, and as public administrator in everything else connected with the estate. If this money was ever rightfully in Purdy's hands at all, it was because he did not administer as public administrator but as executor. If he acted under his authority as public administrator, then there was no valid sale of the lands; the heirs and distributees can recover the real estate, and the purchasers will be the sufferers and entitled to this money.

NAPTON, J.—This action is against Purdy, public administrator of Audrain county, and his securities, upon an order of the probate court to pay over a legacy in the will of Francis Carbine. The testator died in Audrain county in 1866, where he had lived for eight or ten years. He was an unmarried man, without relatives in this State, and resided in the house of a friend until his death. His personal estate consisted of but a few dollars in money, a small library and his clothing—altogether estimated at less than two hundred dollars. He had, however, a considera-

ble real estate, and, of his will devising this, he made Purdy, public administrator, his executor. He directed his lands to be sold, and their proceeds to be distributed in certain proportions among his devisees, of whom the plaintiff, his half sister, was one.

An order was made by the probate court upon Purdy to pay over this sum, and, on his failure to do so, this suit was brought against his sureties on the bond as public administrator.

The only question is, whether these securities are liable for their principal's defalcations in the management of this estate. This is a question of law, depending on the construction to be given to the record of the probate court. The circuit court decided, on the production of this record, that the securities were not liable. Our opinion is that they are. Purdy calls himself, in his settlements with the probate court by various designations, public administrator, executor, administrator with the will annexed, and sometimes simply administrator. We think this of no importance. The question is in which capacity did the court recognize him, and in what capacity only could he act. That he did not qualify as executor is conceded. He took out no letters testamentary, and gave no bond. That he did not act as private administrator with the will annexed, is equally clear, for he applied for no such appointment, and gave no bond as such. Under the 8th section of our statute, five cases are enumerated in which the public administrator may assume charge of an estate, without the interposition of the probate court. In each of these cases he is left to decide in the first instance, whether his duties require him to act. He may be mistaken in his construction of this provision, and any one interested, in the event that his conclusion is wrong, may procure his removal, but unless this is done, and whilst he is acting *colore officii*, his securities are responsible.

A public administrator, when he takes charge of an estate where there is a will, is invested with the same

powers, and assumes the same duties as the executor or a private administrator with the will annexed. Purdy, it appears from the record in this case, exercised the powers confided to the executor in regard to the sale of lands. He was recognized by the probate court as administrator with the will annexed, and of course bound to conform to its provisions. The fact that Purdy never gave the notice required by the statute, to be given by a public administrator when he takes charge of an estate under the 8th section, cannot relieve him or his securities from responsibility. An officer, who exceeds his authority or disregards his duty, is nevertheless responsible, if he acts under color of his office. *Miss. County v. Jackson*, 51 Mo. 25; *Rollins v. The State*, 13 Mo. 437. So even where an administrator has no power to sell, and he does sell and fails to account for the proceeds, his securities are responsible. *State to use of Peppler v. Scholl*, 47 Mo. 84; *Gamble v. Gibson*, 59 Mo. 594. The record in this case clearly shows that the probate court recognized Purdy as administrator of the estate, under the will, by virtue of his public office. Indeed there was no other capacity in which he could act, without giving bond. Our statute says that the sale and conveyance of real estate under a will shall be made by the acting executor or administrator with the will annexed, if no other person be appointed by the will for that purpose, or if such person fail or refuse to perform such trust. Purdy never applied to the probate court for leave to sell, but evidently assumed that as he had been named executor in his official capacity of public administrator, and had given bond as such, he was authorized to proceed without additional bond. Whether he was mistaken in this, is not material. All his acts were in the capacity of public administrator, and were only recognized by the court as acting in that capacity. Judgment reversed and cause remanded.

REVERSED.

KINEALY v. MACKLIN *et al.*, *Appellants.*

Appeal: PARTY AGGRIEVED. A purchaser of land at execution sale brought suit in the St. Louis circuit court to have a deed to the land made by the execution debtor set aside as fraudulent. Upon a hearing an interlocutory decree was enterd, finding the issues for the plaintiff, and providing that the deed should be set aside, unless the defendants should, within a time fixed, pay into court the amount of the execution debt and costs. This having been done, plaintiff's suit was dismissed. Thereupon both parties appealed to the general term of the circuit court, where the decree was reversed for the error of the court in permitting defendants to retain the land upon paying the debt, and the cause was remanded. That court had power, if it saw fit, to enter such a decree as the circuit court should have entered. Upon appeal taken by the plaintiff from the judgment of the general term, *Held*, that he was not aggrieved by that judgment, and had no right to appeal.

Appeal from St. Louis Court of Appeals.

The case is reported in 2 Mo. App. 241.

Thoroughman & Warren for appellants.

No appeal lay from the so-called interlocutory order, but defendants duly excepted to it, and when the final judgment was rendered, they, as well as the plaintiff, appealed to general term. General term in all things reversed the judgment and remanded the cause, and plaintiff alone appealed to this court—from what? It cannot be said his appeal was from the judgment of reversal for that was in his favor, and nothing is better settled than that a party cannot appeal from a judgment in his favor. *Holton v. Ruggles*, 1 Root (Conn.) 318; *Raymond v. Barker*, 2 Id. 370; *Addix v. Fahnestock*, 15 Ill. 448; *Doub v. Hauser*, 7 Ired. (N. C.) 167; Hiliard on New Trials (2 Ed.) 718. The only thing from which it can be claimed the appeal was taken, was the failure or refusal of general term to proceed to enter up an original decree, and this we insist was a matter entirely within the discretion of general term, which

will not be reviewed in this court. Laws applicable to St. Louis county, p. 81; Sess. Acts 1869, p. 17; *Ledyard v. Phillips*, 32 Mich. 138; *Hale v. Clauson*, 60 N. Y. 339; *Doggett v. Lane*, 12 Mo. 215; *Baker v. White*, 2 Otto 176; *Wheeler v. Smith*, 13 Iowa 564; *People v. Northern R. R. Co.*, 53 Barb. 98; *Smith v. Billett*, 15 Cal. 23. The judgment at general term reversed and arrested that at special term against plaintiff, and left nothing to appeal from. No appeal lay except from final judgment. Laws applicable to St. Louis county, p. 81, p. 72, § 17; *Garesche v. Emerson*, 31 Mo. 258; *Bybee v. Maxwell*, 43 Mo. 209; *Myerson v. Howe Ins. Co.*, 15 Fla. 574.

M. Kinealy with *Dryden & Dryden* for respondent.

When the general term concluded to order a new trial, no matter what other course they might have taken, they made an order which put the case out of that court, which consequently, could be appealed from by the party aggrieved. *Strouse v. Drennan*, 41 Mo. 290; Acts 1869, p. 18, § 2. The right of appeal is purely statutory. *Barth v. Rosenfield*, 36 Md. 604; 1 Maddock Ch. Pr. p. 572; *Clark v. Brooks*, 2 Abb. Pr. (N. S.) 385, 406. It has always been the practice to allow an appeal from one part of a decree though the residue thereof was favorable to the party appealing. 1 Van Santvoord's Eq. Pr. p. 653; *McCabe v. Farnsworth*, 22 Mich. 53; *Foley v. Whittaker*, 26 Ark. 95; *Hurck v. Erskine*, 50 Mo. 119; *State v. Newkirk*, 49 Mo. 472. Plaintiff was aggrieved by the remand for a new trial, because, under the circumstances, it was a departure from the settled practice of appellate courts in equity cases, and because it was compelling the plaintiff to incur the annoyance, delay and great expense of another trial of a case already fully tried, and without a single suggestion on the record that any more evidence could be adduced to support defendant's case on another trial. *Gale v. Grannis*, 9 Ind. 143; *Carney v. Emmons*, 9 Wis. 118; *LeGuen v. Gouv-*

erneur, 1 John. Cases 436; *Beebe v. Bank of New York*, 1 John. 529; *Chaplin v. Bree*, 7 Brown Par. Cases 204; *Union Bank v. Jones*, 4 La. Ann. 220.

SHERWOOD, C. J.—The plaintiff, having purchased at execution sale the interest of Patrick Macklin in certain real estate, brought this suit to divest the title out of defendants and to vest it in himself. Upon a hearing had, an interlocutory decree was entered, finding the issues for plaintiff, and providing that the deed to Haydell, the trustee of the wife, should be set aside as prayed, unless the defendants would, in a fixed time, pay the amount of the judgment under which plaintiff bought, as well as costs, and further providing that, upon such payment being made into court, plaintiff's petition should be dismissed; otherwise a decree should be entered for plaintiff setting aside the deed to Haydell. Upon objections duly made, defendants paid the money into court, and thereupon the petition was dismissed. From this judgment both parties appealed; the plaintiff, because regarding himself as entitled to a decree for the land; the defendants, because compelled to pay the money. At general term both appeals were heard, and judgment rendered reversing that of special term, and remanding the cause. Plaintiff, alone, appealed to the St. Louis Court of Appeals, where judgment was rendered in his favor as prayed in the petition. Defendants have, from that judgment, appealed to this court.

The statute, in force when the appeal was taken from the judgment of the general term, provided: * * * said court may, at general term, award a new trial, reverse or affirm the judgment rendered, or decree or order made at special term, or give such judgment as the court at special term ought to have given, as to them shall seem agreeable to law. But from such award of a new trial, and from any judgment rendered, or decree or order made at general term, reversing or modifying a judgment, decree or order made at special term, the party or parties

aggrieved thereby may appeal to the Supreme Court in the same manner, and with the like effect, as provided for by law in respect to appeals from final judgments rendered by said court at general term. (Acts 1869, p. 18.) It will be observed that similar language is employed as to the power of this court, when a cause is brought before us, thus: "The Supreme Court, in appeals or writs of error, shall examine the record and award a new trial, reverse or affirm the judgment or decision of the circuit court, or give such judgment as such court ought to have given, as to them shall seem agreeable to law." (2 Wag. Stat., 1068, § 34.) And section 45, (2 Wag. Stat., p. 1069,) in relation to appeals, gives recognition to the right of this court, to direct what judgment the circuit court shall render, or to affirm the judgment of such court only in part. This court is in the constant exercise of the powers above noted, and, in their exercise, it may simply affirm a judgment, give such judgment as ought to have been given, enter a modified judgment, reverse the judgment, reverse the judgment and remand the cause, or reverse and remand with directions to the lower court to enter a specified judgment; so that it will be readily seen that aside from judgments simply of reversal or affirmance, a wide latitude of discretion belongs to this court in its disposal of causes. Obviously, the same discretionary margin was allowed to the general term, at the time under consideration. This being the case, the only difference resulting from the exercise of such powers, by the different appellate tribunals, is that, from the judgments rendered by the general term, an appeal lay, where a party was "aggrieved" by the judgment. Now, it is plain enough, that if, on the first appeal, general term had entered such a judgment as the court below ought to have entered for plaintiff, or had appropriately modified the judgment, plaintiff would in no sense have been "aggrieved," and consequently, under the terms of the statute, would have possessed no right of appeal. But it must be remembered that general term, by the express statutory

language quoted, has precisely the same discretionary power to reverse and remand, as it has to dispose of a cause in the other modes above mentioned. A party cannot be said to be "aggrieved," unless error has been committed against him. The complaint of the plaintiff when closely scrutinized, is not that the general term erred, but that it would not have erred had it gone further, and entered a suitable decree. No doubt the latter course would have been the more appropriate one, but under the discretion conferred by the statute, it was entirely optional with the general term what course of those named, it should pursue; as much so, as though this court were engaged in the exercise of similar functions. Besides, the effect of the judgment of general term was practically as beneficial in its results to plaintiff, as though a judgment of reversal and remanding had occurred, accompanied by directions to enter the proper judgment, because, that judgment, of necessity, informed the court at special term, that it had erred in requiring the plaintiff to accept the money instead of the land, and in dismissing his petition for failure to accept the unwarrantable alternative.

The law seems to be well settled that a party cannot take an appeal from a judgment in his own favor. (*Holton v. Ruggles*, 1 Root 318; *Raymond v. Barker*, 2 Id. 370; *Ringold v. Barley*, 5 Md. 186; Hilliard on N. T. p. 600, § 104) In *Strouse v. Drennan*, (41 Mo. 290,) the judgment of the district court reversed the judgment of the circuit court, which went in favor of plaintiff, and of course, he was aggrieved, and hence had the right of appeal. This case followed that of *Rankin v. Perry*, (5 Mo. 501,) where the plaintiff, beaten in the county court, took the case to the circuit court; on error there, the judgment was reversed and the cause remanded; and held that defendants, having succeeded in the county court, were aggrieved by the judgment of reversal, (a final one,) rendered in the circuit court, and hence, had a right of appeal to this court. But this court would scarcely have held that the

plaintiff, in that instance, would have been entitled to an appeal from the judgment in his favor, because the circuit court did not go further and enter judgment for him, or direct the county court to do so. If the defendants had appealed from the judgment of general term, as they might well have done, since the judgment of that court went against them, the Court of Appeals might properly have proceeded to determine the cause upon its merits; but, as this was not the case, their motion to dismiss should have prevailed; and we reverse the judgment there rendered against them, and remand the cause to the St. Louis circuit court. All concur.

REVERSED.

ADKINS v. MORAN *et al.*, *Appellants.*

Sheriff's Deed: DESCRIPTION: PAROL EVIDENCE. A sheriff's deed will not be held void because the description is in part unintelligible, if the land, intended to be conveyed, can be identified by parol evidence, (*following McPike v. Allman*, 53 *Mo.* 551).

Appeal from Buchanan Circuit Court.—HON. JOS. P. GRUBB, Judge.

Harwicke & Barnum for appellant cited *McPike v. Allman*, 53 Mo. 551; *Webster v. Blount*, 39 Mo. 500.

Wm. Heren for respondent cited *Campbell v. Johnson*, 44 Mo. 247; *Clemens v. Rannels*, 34 Mo. 579; *Jones v. Carter*, 56 Mo. 403; *Holme v. Strautman*, 35 Mo. 293; *Chadbourne v. Mason*, 43 Maine 389; *Hughes v. Streeter*, 24 Ill. 647.

NAPTON, J.—This was an action of ejectment to recover a portion of the northeast qr of Sec. 1, T. 59, R. 35, lying within certain metes and bounds recited in the petition.

The plaintiff's title was a deed from Walter Huffaker and wife, dated 23d February, 1871, which remised, released and forever quit-claimed the title to the seventy-three acres, more or less, described in the petition. The defendant relied on a sheriff's deed, made in 1865 and duly recorded, which recited a judgment against Huffaker, an execution, levy and sale of all Huffaker's title to the land described in it, which was "seventy acres P. N. of N. E. of Sec. 1, T. 59, R. 35." The deed is dated 7th April, 1865, duly acknowledged and recorded on the 18th of April, 1865. In connection with this deed, the defendant proved by various witnesses, who lived in the neighborhood of the land in controversy, that Huffaker owned and occupied the land in dispute in 1865; that there were about seventy acres in it; that it was on either side of One Hundred and Two river; that since that time a tenant of defendant occupied it; that this land was in the N. E. of Sec. 1, T. 59, R. 35; that in 1865 the land was known in the neighborhood as the Huffaker land; that Huffaker owned no other land nearer than one or two miles from this; that this was the only tract of land ever claimed by Huffaker on this river; that it is in the northeast part of the northeast qr of section 1. The court decided that the sheriff's deed was void for uncertainty, and gave judgment for plaintiffs, and this presents the only point in the case.

We are unable to distinguish this case from that of *McPike v. Allman*, (53 Mo. 551,) in which Judge Vories reviewed all the prior decisions of this court on the subject. The judgment must therefore be reversed, and the cause remanded. The other judges concur.

REVERSED.

BIRCH v. GILLIS, *Appellant.*

Swamp Lands: LAND TITLES: EJECTMENT. Proof that a tract of land is swamp land within the meaning of the swamp land grant of Congress, of September 28th, 1850, without evidence that it has ever been selected as such, is no bar to an action of ejectment for the land brought by one holding a patent from the United States.

Appeal from Holt Circuit Court.—HON. HENRY S. KELLEY, Judge.

C. A. Mossman for appellant, contended that parol evidence was admissible to show that the land was swamp and overflowed. First. Because the plaintiff in ejectment must stand on his own title, and if he has none, he can have no standing in court to disturb defendant's possession. *Hann. & St. Jo. R. R. v. Smith*, 41 Mo. 310; *Foster v. Evans*, 51 Mo. 39; *Cape Girardeau, &c. v. Renfroe*, 58 Mo. 265; *Beal v. Harmon*, 38 Mo. 435; *McGill v. Somers*, 15 Mo. 80; *Robbins v. Eckler*, 36 Mo. 494. 2nd. To invalidate the patent issued to the plaintiff by identifying the land as swamp and overflowed land, the title to which had passed to the State by the act of Congress of September 28th, 1850, after which time the power of disposal in the general government was gone. *Campbell v. Wortman*, 58 Mo. 258; *Clarkson v. Buchanan*, 53 Mo. 563; *Linville v. Bohanan*, 60 Mo. 554; *Hann. & St. Jo. R. R. Co. v. Smith*, 9 Wall. 95. 3rd. If the act of Congress of September 28th, be considered to have had no greater effect than to reserve swamp and overflowed lands from sale, such evidence, by identifying the lands, brought them within such reservation, after which they could not be disposed of by the general government, and an entry of or a patent for said land would be void. *Hann. & St. Jo. R. R. Co. v. Smith*, 41 Mo. 310; *State v. Ham*, 19 Mo. 602; *Brown v. Clements*, 3 How. 667; *Stoddard v. Chambers*, 2 How. 284; *Wright v. Rutgers*, 14 Mo. 586; *Morton v. Nebraska*, 21 Wall. 660. 4th. It was admissible under either construction placed on the act of

Congress of September 28th, 1850; by either construction of said act, if these lands were proven to be of the character described in said act, the plaintiff's patent was a nullity. If a nullity, defendant had the right to show it. *Morton v. Nebraska*, 21 Wall. 660; *State v. Batch l ler*, 5 Minn. 223; *Doll v. Meador*, 16 Cal. 295; *Polk v. Wendell*, 9 Cranch 99; *Campbell v. Wortman*, 58 Mo. 258; *Hann. & St. Jo. R. R. Co. v. Smith*, 41 Mo. 310. 5th. It was admissible to show an outstanding title. *Gurno v. Janis*, 6 Mo. 330; *Meyer v. Campbell*, 12 Mo. 603; *Norcum v. Doench*, 17 Mo. 98; *Callaway v. Fash*, 50 Mo. 420.

E. L. Edwards & Son for respondent, contended that the fact the land was wet or overflowed land, will not prevail against a patent of the United States, unless it has been selected as swamp land, and there was no evidence that the land in controversy had ever been selected as such.

Hough, J.—This was an action of ejectment for land lying in Holt county, in which the plaintiff had judgment, and the defendant has appealed. The plaintiff read in evidence a patent from the United States for the land in controversy, dated December 1st, 1859. The defendant offered no evidence whatever of title in himself, but sought to show an outstanding title in the county of Holt, by testimony tending to prove that the land in question was swamp land within the meaning of the act of Congress of September 28th, 1850, known as the swamp land grant. Conceding that the defendant was in a position to make such a defense, he not only made no offer to show that said land had ever been selected as swamp land, or in any manner identified as being included in the swamp land grant, but, on the contrary, he stated on the trial that he could not show any identification of the land as swamp land under the act of 1850. Some testimony of this character was necessary in order to show title in the county. *Morgan v. Han. & St. Jo. R. R.*, 63 Mo. 129. The

circuit court held that the title was in the plaintiff by virtue of the patent read in evidence, and that he was entitled to recover, and we think its ruling was correct. Judgment affirmed; the other judges concur, except SHERWOOD, C. J., absent.

AFFIRMED.

DIGBY v. JONES *et al.*, *Appellants.*

Sale under Deed of Trust: ENFORCEMENT OF EQUITIES: INNOCENT PURCHASER: NOTICE. An agreement between the owner of land sold under a deed of trust, and the purchaser at the sale for a reconveyance as soon as a debt due from the former to the latter shall have been paid out of the rents, cannot be enforced against a grantee of the purchaser who has bought without notice of the agreement, paid a substantial part of the purchase money in cash, and given his negotiable promissory notes for the remainder. But it might be otherwise if, at the time of the trial the notes remained in the hands of the first purchaser.

Appeal from St. Louis Court of Appeals.

John F. Darby for appellants, argued that plaintiff was not entitled to protection against the agreement between appellants and the bank, because not having paid the whole of the purchase money, he was not an innocent purchaser. Actual payment is necessary, and the giving security or executing obligations for payment is not sufficient. *High v. Batte* 10 Yerg. 186; *Christie v. Bishop*, 1 Barb. Ch. 105; *Murray v. Ballou*, 1 John. Ch. 566; *Hunter v. Simrall*, 5 Littell 62; *Wormley v. Wormley*, 8 Wheat. 444; *Vattier v. Hinde*, 7 Pet. 252; *Doswell v. Buchanan*, 3 Leigh 365; *Dillard v. Crocker*, 1 Speer Eq. 20; *Kyles v. Tait*, 6 Gratt. 44. Besides, the plaintiff lived within a few feet of the defendants, Lewis and Julia Jones, in the same block, on the same side of the street—he had lived there for seven

years—knew the defendants well; saw Julia Jones sweeping off the sidewalk every morning; spoke to her every day—bidding her "good morning"—interchanging the salutations of the day. All this is shown by the record. He knew she paid no rent, and claimed the property. What is sufficient notice to affect a subsequent purchaser, from one who has previously entered into a contract for the sale of lands, see *Caldwell v. Carrington*, 9 Pet. 86; *Flagg v. Mann*, 2 Sum. 486; *Burbank v. Hammond*, 3 Sum. 429. A party, put by circumstances on inquiry as to a fact, is affected by constructive notice thereof. *Oliver v. Piatt*, 3 How. 333; *U. S. v. Sturges*, 1 Paine 525; *Hinde v. Vattier*, 1 McLean 110. Open, notorious and exclusive possession of real property by parties claiming it, is sufficient to put other persons upon enquiry as to the interests, legal or equitable, held by such parties; and if such other persons neglect to make the inquiry, they are not entitled to any greater consideration than if they had made it, and had ascertained the actual facts of the case. *Smith v. U. S.*, 2 Wall. 232.

Hitchcock, Lubke & Player for respondent, cited *Love v. Taylor*, 26 Miss. 567; *Padgett v. Lawrence*, 10 Paige 170; *Freeman v. Deming*, 3 Sandf. Ch. 327; *Bellas v. McCarty*, 10 Watts 13; *Flagg v. Mann*, 2 Sum. 564; *Gilday v. Watson*, 5 Serg. & Rawle 267; *Aubuchon v. Bender*, 44 Mo. 560; 2 White & Tud. Lead. Cas., 52, 118.

Henry, J.—Plaintiff sued defendants in ejectment in the circuit court of St. Louis county for a lot in the city of St. Louis, and defendants in their answer alleged, as an equitable defense, that the Real Estate Saving Institution, plaintiff's grantor, acquired the legal title by purchase at a trust sale, under an agreement with the defendants to hold the legal title until a certain demand it held against them for money borrowed should have been paid out of the rents, and then convey it to the defendant, Julia Jones;

that the debt, about $5,000, was not one-fourth the value of the property; that plaintiff had knowledge of their equity, and also that he had not paid the purchase money. The replication was a denial of the material facts stated in the answer. At the same time there was pending in the said circuit court, a suit in which these defendants were plaintiffs, and the plaintiff herein, and said Real Estate Saving Institution were defendants, the object of which was to have said sale to plaintiff herein set aside, and allow the plaintiffs to redeem the property. It was agreed between the parties that this, the ejectment suit, should be taken as submitted to the court sitting as a jury, upon the testimony which should be introduced on the hearing of the other cause in which defendants were plaintiffs, and that judgment should be entered in this cause immediately after the trial of the other. On the trial of that cause the court submitted to a jury issues, among them the following: Did the defendant, Henry Digby, prior to his purchase of the property in question from the Real Estate Saving Institution, have any notice of the alleged private agreement or understanding between said institution and plaintiffs, as alleged in the petition? The verdict of the jury was that he had not such notice, and after hearing all the evidence, the court made a decree that the said Real Estate Saving Institution pay to plaintiffs (defendants herein) thirteen thousand dollars, and that Henry Digby go hence without day as to all and singular the matters pleaded against him herein, &c. The court, in pursuance of the agreement above recited, after the trial of the cause in which defendants here were plaintiffs, found for the plaintiff, Digby, in this cause, and rendered a judgment accordingly, which, on appeal to the general term by defendants, was affirmed, and was again in the Court of Appeals affirmed, and defendants have prosecuted an appeal to this court. On the issue submitted to the jury, by the court, as to plaintiff's notice of the equities of defendants, the evidence was contradictory. Defendants were

in possession of the property, claiming it as owners, and there was evidence conducing to show that plaintiff was aware of that fact. He, on the contrary, testified that he did not know that they made any claim to the property as owners. There was not such preponderance of evidence in favor of defendants on that issue as would justify a reversal of the judgment on that ground. As to actual notice of the agreement between the bank and the defendants the weight of evidence was that plaintiff had no knowledge of that agreement, and the court might have held the law to be, as contended by counsel for defendants, that if plaintiff had knowledge that defendants were in actual possession of the premises, claiming to be owners, such knoweledge affected him with notice of their equity. This, as a legal proposition, we think correct, but there is nothing in this record indicating that the court entertained a contrary opinion, since there was such a conflict of evidence as to whether plaintiff knew that defendants were in possession, claiming to be owners of the lot, that the verdict would not be disturbed, however the jury might have found on that issue. The court and the jury had the witnesses who testified before them, and were therefore far more competent than this court to determine what credit to attach to them respectively, as witnesses, and we are not inclined to disturb the findings of trial courts, even in equity cases, unless satisfied that injustice has been done.

The consideration which plaintiff agreed to pay for the property was $10,000. He paid cash $2,500, and for the balance gave his negotiable promissory notes, with a deed of trust upon the property to secure their payment. It is true that the purchaser of property under the circumstances disclosed by the evidence in this cause, to be protected in his purchase, must not only have purchased without notice, but the consideration given must have been valuable and wholly or partly paid. *Paul v. Fulton*, 25 Mo. 156. And the part payment must not be of an incon-

siderable portion of the purchase money, a mere nominal sum; and the execution of a non-negotiable obligation for the purchase money, which remains unpaid, will not protect the purchaser against the person who has an equity which entitles him to the property against the grantor. Here the price agreed upon was $10,000; one-fourth was paid in cash, and negotiable notes given for the balance. It was not shown what had become of those notes. No effort was made on the trial to prove who held them. The president and several other officers of the bank and the plaintiff testified as witnesses, and defendants' counsel did not see proper to make any inquiries on the subject. If the bank still held those notes it might have materially affected the result of this controversy, but under the circumstances, we would not be justified in assuming what the defendants could so easily have proved, if true, that the bank still held them. If negotiated to innocent purchasers, then the plaintiff's case is the same as if he had paid the entire consideration in cash. Even if the notes were still in the possession of the grantor, some difficulty would be encountered in granting the relief sought against the vendee. The pendency of the suit by the party who claimed the equity, to set aside the sale and to redeem, would not affect a purchaser of the negotiable notes, with notice of their infirmity and the holder might *pendente lite* even after all the evidence was heard in the cause, assign the notes to an innocent purchaser. It might, therefore, well be doubted, whether in the absence of proof of notice to him of the equity, relief could be given against a vendee who had executed negotiable notes for the purchase money, unless the court could first get possession of the notes and hold them until the final disposition of the cause.

The judgment is affirmed. All concur except Hough, J. and Sherwood, C. J., not sitting.

Affirmed.

JONES v. REAL ESTATE SAVING INSTITUTION, *Appellant.*

Deed of Trust Sale: SUIT TO REDEEM: STATEMENT OF ACCOUNT: INTEREST. In a suit by the grantor in a deed of trust against the beneficiary to enforce an agreement for the redemption of improved real estate, purchased by the latter at a sale under the deed, and subsequently sold by him to a third party, the court having found that the plaintiff was entitled to recover; *Held*, that an account should be stated charging defendant with the rents collected by him while he held the property, and its value at the date of the second sale, and crediting him with all taxes and necessary and reasonable repairs put upon the property, and with other necessary expenses incurred in its management, together with the amount due on the original indebtedness, and upon the balance so ascertained to be due at the date of the second sale, interest should be allowed from that time.

Appeal from St. Louis Court of Appeals.

Martin & Lackland for appellant.

John F. Darby for respondent.

HENRY, J.—In 1862 plaintiffs owned a lot of ground in the city of St. Louis, bounded north by Jefferson street, west by Eleventh street, east by Tenth street, and south by an alley. There are five two-story brick houses and three frame houses on the lot. The improvements were made and the land bought partly with the money of the plaintiff, Julia Jones, but the title was in her husband, Lewis Jones, her co-plaintiff. On the 1st of December, 1862, Lewis Jones borrowed of defendant $5,650, for which he gave his note, payable three years after its date, with interest from its maturity at ten per cent. per annum, and six semi-annual interest notes, each for $282.50, all secured by a deed of trust conveying the above described property to Jno. M. Krum. Porter & Wolf afterwards—until about 1867—and then Levering & Webster were the agents of plaintiffs, to collect their rents, pay taxes, &c. These agents collected the rents, and from time to time, deposited

the same with defendant, to be applied in payment of the interest notes. Marcus A. Wolf had a judgment against Lewis Jones for $885 and costs, and was about to have the property above described sold on execution, when, by an arrangement between plaintiffs and defendant, the defendant procured an assignment from said Wolf of said judgment, to the defendant, and afterwards purchased the property at a sale under an execution, issued on Wolf's judgment. The plaintiffs had money on deposit with defendant, within $40 or $50 of the amount of said judgment, with which said assignment was procured.

After this purchase, in 1869, the defendant had the property advertised for sale by the trustee, Jno. M. Krum, to satisfy the indebtedness secured by the deed of trust to Krum, and in their petition, plaintiffs alleged that there was an agreement between them and the defendant that the latter should purchase the property and hold it until the satisfaction of their debt out of the rents of the property, and then convey it to Julia. In November, 1872, the defendant sold and conveyed all of said property to Henry Digby, for the consideration of $10,000, and the plaintiffs charged in their petition that Digby purchased with notice of their equity, and asked to be permitted to redeem said land, and for general relief.

On the trial, the court submitted to a jury, the following issues:

First. Did the Real Estate Saving Institution purchase the property described in the petition, at sheriff's sale, and agree with the plaintiffs, at the time of said sale, to hold said property in trust for them, until the rents of the same should pay the debt mentioned in the petition, or until said property should be otherwise redeemed by the plaintiffs?

Second. Did the Real Estate Saving Institution purchase the property described in the petition, at trustee's sale, and agree with the plaintiffs, at the time of said trustee's sale, to hold said property in trust for them until the rents

of the same should pay the debt mentioned in the petition, or until said property should be otherwise redeemed by the plaintiffs?

Third. Did defendant, Henry Digby, prior to his purchase of the property in question, from the said Real Estate Saving Institution, have any notice of the alleged private agreement or understanding between said institution and plaintiffs, as charged in the petition?

To the first and second issues, the jury said "Yes." To the third issue, they said "No."

With the Digby branch of the case, we have now nothing to do. That controversy has been determined by us in another cause, at this term—*Digby v. Jones and Wife*, *ante* p. 104. The circuit court, upon these findings, gave judgment for Digby, and holding the Real Estate Saving Institution, as a trustee of the property for the plaintiffs, gave judgment against it for $13,000. Defendant appealed to the Court of Appeals, where the decree of the circuit court was set aside, and a decree entered in favor of plaintiffs against defendant for $10,917, with interest, on that amount from 17th November, 1872, at six per cent. per annum. From that judgment, defendant has appealed to this court.

We are not inclined to disturb the findings of the court and the jury, on the issues submitted. There was conflicting evidence, and no such preponderance on either side as would warrant us in disturbing the verdict, whether on those issues it had been for plaintiff or defendant. We shall affirm so much of the decree as finds and holds the defendant as a trustee for plaintiffs, from the date of their purchase under the execution sale, 20th day of February, 1869, to the date of the sale made by the defendant to Digby in November, 1872. It is clear from the evidence of Lewis Jones, and Mrs. Robertson, and Naylor, that in 1869 there was a considerable balance due defendant from Jones, on the note secured by the deed of trust.

Mrs. Robertson says she was present at a conversation

between Lewis Jones, Mrs. Jones and Naylor, shortly after the trust sale; that when Naylor informed them that the property had been sold for $10,000, Lewis Jones asked what they would do with the overplus? Jones testified that he proposed to raise money to pay off the debt, if they would be willing to let him have the property back. Naylor testified that at the date of the sale, in 1869, $5,500 were due on the note. In the decree of the circuit court there is nothing said of this indebtedness, and for aught that appears upon the face of the decree, it was entirely ignored. The evidence in regard to the value of the property would also indicate that the circuit court took no account of that indebtedness, in the decree it rendered. Certainly Jones and wife were not entitled to the value of the property without paying whatever remained unpaid of the note. What that amount was, it is impossible to ascertain, from the evidence preserved in the bill of exceptions. We might approximate the rents received by defendant from 1869 to 1872, but it would be unsatisfactory and might do great injustice to one or the other of the parties. We hold that Jones and wife are entitled to the rents received by the defendant for this property, from the 20th of February, 1869, to the date of the sale to Digby, for during that time defendant was a trustee for plaintiffs; that from that amount should be deducted necessary reasonable repairs, taxes and necessary expenses, incurred by the defendant in the management of the property, so that defendant shall be charged only with the net amount realized from rents; that plaintiffs are also entitled, against defendant, to the value of the property when sold to Digby; that from the aggregate of net rent and the value of the property, defendant is entitled to a deduction of the amount of said note, which is unpaid, and on the balance which may be found in favor of plaintiffs interest at 6 per cent. per annum, should be allowed from the date of the sale to Digby. Any moneys received by defendant, prior to the 20th of February, 1869, to be so applied, are of

course, to be treated as payments on said notes. The judgment of the Court of Appeals is reversed and the cause remanded to the circuit court, with directions to have an account taken, to ascertain the several amounts above indicated, including the value of the property at the date of the sale to Digby, and otherwise to proceed with the cause in conformity to this opinion. All concur, except HOUGH, J., not sitting.

REVERSED.

STATE *ex rel.* GREELY v. CITY OF ST. LOUIS, *et al.*, *Appellants.*

1. **Street Opening**: ASSESSMENT OF BENEFITS: NOTICE: MARSHAL'S RETURN. The charter of the city of St. Louis (Acts 1870, p. 478, § 2), provided that notice of proceedings to open any street should be given to any person whose property was to be condemned, either by delivering the same to him, or by leaving a copy at his usual place of abode; also, that notice should be given to any person against whose property it was proposed to assess benefits, "such notice to be served or published for the same terms of time, for like causes and with like effect, respectively, as is provided for notices in cases of condemnation." In a proceeding under this act the city marshal returned that he had served notice on certain persons, against whose property it was proposed to assess benefits, "by having had personal service." On *certiorari* to set aside an assessment founded upon this notice, *Held*, 1st, That a person whose property was assessed with benefits was entitled to be served with notice in the same manner as one whose property was condemned; 2nd, That the marshal's return was insufficient, because it failed to state in what the personal service consisted; 3rd, That the proceeding being *in invitum*, statutory, summary and in derogation of private right, and notice being essential to confer jurisdiction, the assessment was void, because it did not appear affirmatively on the face of the record that the prescribed notice had been given.
2. **Amendment of Officer's Return.** A paper intended as an amended return of the marshal showing service of a notice will not be allowed to have effect as such unless made and filed by leave of court.

Appeal from St. Louis Court of Appeals.

Leverett Bell with *W. H. Horner* and *Joseph Dickson* for appellants.

The return of the marshal is sufficient. The words, "personal service," have a fixed, definite and well-known meaning, and indicate that he either read or delivered a notice to the parties personally. The meaning of the officer may be gathered from the face of the return—all portions being regarded, and that is all that the law requires. That he meant that he delivered or read the notice to the persons named as having been "personally served," is clear, when we consider that his return is in three parts. As to one class, he says he executed the writ by "having had personal service;" as to another class, by leaving at the usual place of abode, and still another that he could not find them and therefore served such by publication. Aside from this, the law did not require the marshal to give persons, whose property might be assessed benefits, any particular kind of notice; nor did it require him to serve it in any particular manner. Had the law-makers intended to prescribe any particular form of notice, or any special manner of serving same on the parties to be assessed benefits, they would have so declared, as they did in the first part of the same section as to notice to be given to parties whose land it was proposed to condemn. Laws of Mo. 1870, p. 478, § 2. By this section it will appear that the only particular in which the two notices are similar, is in the requirement that in case of a published notice the "terms of time" are the same.

Futhermore, the ambiguity of the return is not such an error as will warrant the total setting aside and annulling of this important proceeding. An amendment of the return has been allowed in cases similar to case now under discussion, and it has been held that an officer may amend

his return after the case has been appealed and is in the Supreme Court. And the officer in this case did amend the return, curing the alleged defect. *Blaisdell v. Steamboat Pope*, 19 Mo. 159; *Stewart v. Stringer*, 45 Mo. 115; *Muldrow v. Bates*, 5 Mo. 214; Wag. Stat., pp. 1036–7, §§ 19, 20; *Phillips v. Evans*, 64 Mo. 17.

S. A. Holmes for respondent.

1. There must be a strict compliance with all the requirements of the statute in proceedings to take property for public use, and that compliance must appear upon the face of the proceeding, or they are void. *Ells v. Pacific R. R.*, 51 Mo. 200; *Leslie v. St. Louis*, 47 Mo. 474; *Anderson v. St. Louis*, 47 Mo. 479; *Ruggles v. Collier*, 43 Mo. 353.

2. The land commissioner acquired no jurisdiction of the relators or their property in the proceedings before him. There was no service of the notice as to them, and in contemplation of law they had no notice, and, as to them, the proceeding is void. Sess. Acts 1870, Sec. 2, p. 478; *Dickey v. Tennison*, 27 Mo. 373; *Boonville v. Ormrod*, 26 Mo. 193; *Waddingham v. St. Louis*, 14 Mo. 190; *Hewitt v. Weatherby*, 57 Mo. 276; *Charless v. Marney*, 1 Mo. 537; *Smith v. Rollins*, 25 Mo. 408; *Huff v. Shepard*, 58 Mo. 246; 2 Dillon on Mun. Corp. (2 Ed.) § 471, p. 571.

Norton, J.—This is a proceeding by *certiorari* in the circuit court of St. Louis county, the purpose of which is to correct certain alleged errors of the land commissioner of the city of St. Louis, in the assessment of benefits against relators growing out of opening Franklin Avenue, a street of said city. On the trial, judgment was rendered for defendants, which, on appeal to the St. Louis Court of Appeals, was reversed and judgment rendered for plaintiffs, from which defendants have appealed to this court.

It is claimed that the record discloses five valid ob-

jections to the legality of the proceedings of the land commissioner, one of which is as follow, viz: that it nowhere appears from the said record that either of the said relators had any legal or proper notice of the proceedings of said land commissioner in opening Franklin Avenue. The law authorizing the proceeding provides that, in opening any street, six days notice shall be given to the persons whose property is to be condemned, and that the notice shall be served by the city marshal, either by delivering the same to the person, or by leaving a copy thereof at the usual place of abode of such person, with some member of the family over the age of fifteen years; also, that the land commissioner shall cause a notice of the commencement or pendency of proceedings for the assessment of benefits with which to meet payments of any such damages to be given to any person whose property it is proposed to assess for that purpose, and that such notice shall be served or published for the same terms of time, for like causes and with like effect, respectively, as is provided for notices in cases of condemnation. Acts 1870, p. 478, Sec. 2. We think the obvious meaning of the law is, that a person whose property is assessed with benefits, is to be served with notice in the same manner that a person whose property is condemned, is required to be served.

The return of the marshal, as to service of notice on the relators, does not comply with the law. It does not show that it was served, either by delivering it to them, or by leaving a copy thereof at their usual place of abode. It simply states that he executed the same by having had personal service. It was not for the marshal to determine what was personal service. The return should have stated in what the personal service consisted, so that the court could determine its sufficiency.

It is said in the argument of counsel, that this return was amended so as to make it comply with the law. From the record before us, this does not appear. It is true, among the papers we find a detached paper signed by the

marshal, not marked filed, purporting to be an amended return, on the back of which is the following indorsement:

"Presented, and amendment granted, Feb. 4, 1874.
LEWIS, Clerk."

This paper we cannot consider, first, because it is not filed; and, second, because if intended as an amended return, it does not appear to have been made by the authority of the court. Amendments of this character are allowable, but can only be made under the sanction of the court, or some competent authority. Sec. 21, Wag. Stat. 1037, provides "that no process, pleading or record shall be amended or impaired by the clerk or other officer, without the order of such court, or some court of competent authority."

This we presume was the view taken of this alleged amended return by the Court of Appeals, as nothing is said in relation to it in the opinion delivered, and it is only adverted to here, because it has been brought to our attention in appellants' brief and passed *sub silentio* in that of respondent.

The proceeding against relators being *in invitum*, statutory and summary, and in derogation of private right, the utmost strictness is required in order to give it validity, and, unless upon the face of the proceedings had, it affirmatively appear that every essential prerequisite of the statute conferring authority, has been fully complied with, every step from inception will be *coram non judice*. (*Ells v. Pacific R. R.*, 51 Mo. 200.)

Notice to relators was a jurisdictional fact, and an essential prerequisite to be complied with, before their property could be assessed with benefits. The record does not show that this notice was given, and hence it follows that, for that reason, if for no other, the judgment of the Court of Appeals was for the right party, and should be affirmed,

which, with the concurrence of the other judges, is done.

AFFIRMED.

ULLMAN v. HANNIBAL & ST. JOSEPH R. R. Co., *Plaintiff in Error.*

Railroad: LIABILITY OF COMPANY FOR TORTIOUS ENTRY OF ITS CONTRACTOR ON LANDS OF ANOTHER. A railroad company, by whose direction a contractor for the construction of its road enters and builds the road upon land which it has acquired, subject to an existing lease, is liable, as a joint tort-feasor with the contractor and his servants, for damages done by them, in the prosecution of the work, to the crops of the lessee.

Error to Buchanan Circuit Court.—HON. JOSEPH P. GRUBB, Judge.

James Carr for plaintiff in error, argued that if the road had been built by the company's officers, agents and employees, it would have been liable on the doctrine of *respondeat superior*; but having been built by an independent contractor, who took the whole job at a stipulated price, employing and paying his own workmen, over whom the company had no control, it is not liable, citing *Clark v. Hann. & St. Jo. R. R.*, 36 Mo. 202; *Barry v. St. Louis*, 17 Mo. 121; *Harriman v. Stowe*, 57 Mo. 98; 1 Redfield on Railways, 506; *Laugher v. Pointer*, 5 B. & C. 547; *Quarmann v. Burnett*, 6 M. & W. 499; *Reedie v. N. W. R. R. Co.*, 4 Exch. 248; *Peachy v. Rowland*, 16 Eng. L. and E. 442; *Overton v. Freeman*, 8 Ib. 479; *Sadler v. Henlock*, 30 Ib. 167; Steel *v. S. E. R. R. Co.*, 32 Ib. 366; *Scott v. Mayor, &c.*, 38 Ib. 477; *Bailey v. Mayor*, 3 Hill 531; 2 Denio, 433; *Delmonico v. Mayor*, 1 Sandf. 222; *Lloyd v. Mayor*, 1 Selden 369; *Blake v. Ferris*, 1 Seld. 48; *Pack v. Mayor*, 4 Seld. 222; *Kelly v. Mayor*, 1 Kernan 432; *Currier v. Lowell*, 16 Pick.

170; *Lowell v. B. & L. R. R. Co.*, 23 Pick. 24; *Hilliard v. Richardson*, 3 Gray 349; *Carson v. Godley*, 2 Casey, 111; *Erie v. Schwingle*, 10 Harris 384; *West Chester v. Apple*, 11 Casey 284; *Samyn v. McClosky*, 2 Ohio St., 536; *Carman v. S. & I. R. R. Co.*, 4 Ohio St. 399; *DeForrest v. Wright*, 2 Mich. 368; *Wiswall v. Brinson*, 10 Ired. 554; *Buffalo v. Holloway*, 3 Seld. 493; *Milligen v. Wedge*, 12 A. and E. 737; *Allen v. Hayward*, 7 Id. N. S. 960; *Rapson v. Cubitt*, 9 M. & W. 710; *Knight v. Fox*, 1 Eng. Law and Eq. 477; *Painter v. The Mayor, &c.*, 46 Penn. St. 213; *O. & M. R. R. Co. v. Davis*, 23 Ind. 553; Story on Agency, §§ 453, 454; Pierce on Am. Railway Law, pp. 235, 242; 2 Hilliard on Torts, §§ 533, 551.

W. H. Sherman for defendant in error, argued that as the contractor had no right on the plaintiff's land, except through the authority of the company, the contractor must to that extent be considered as its servant, and the company must be liable for his acts. *West v. St. L., V. & T. H. R. R. Co.*, 63 Ill. 545; *C., St. P. & F. R. R. Co. v. McCarthy*, 20 Ill. 385; *O. & M. R. R. Co. v. Dunbar*, 20 Ill. 623; *Lesher v. Wab. Nav. Co.*, 14 Ill. 85; *Hinde v. Wab. Nav. Co.*, 15 Ib. 72; *Robbins v. Chicago*, 4 Wall. 679; *Vt. C. R. R. Co. v. Baxter*, 22 Vt. 365; *Stone v. Cheshire R. R. Co.*, 19 N. H. 427; *Carman v. Steuben, &c., R. R. Co.*, 4 Ohio St. 415; *Storrs v. Utica*, 17 N. Y. 104; *Congreve v. Smith*, 18 N. Y. 79; *Creed v. Hartman*, 29 N. Y. 591; S. C. 8 Bosw. 123; *Mayor v. Furze*, 3 Hill 612; *Lowell v. R. R. Co.*, 23 Pick. 31; *Lauderbrun v. Duffy*, 2 Penn. St. 398; Wharton on Negligence, §§ 185, 186, 187 and note 6; Shearman & Redfield on Neg. 423: Redfield on Railways, Vol. 1, § 68, p. 247, (3d Ed.); *Hole v. S. & S. Rail'y Co.*, 6 Hurlst. & Norm. 497; *Pickard v. Smith*, 10 C. B. (n. s.) 470; *Gray v. Pullen*, 5 Best & Smith 970; *Ellis v. Gas Co.*, 2 Ellis & Bl. (75 E. C. L.) 767, 770; *Newton v. Ellis*, 5 Ellis & Bl. 124.

The cases bearing upon the question of the liability

of an employer for acts of contractors and employees may be ranged in three classes:

1st. Early in the history of cases of this character, it was held that the employer was liable, at all events, for the negligence of employees in doing work, whether there was an intermediate contractor or not.

2nd. Subsequent decisions, made in a reactionary spirit, restricted this rule of law until it was at last held by able courts that the relation of principal and agent, or master and servant, must be established in all cases before any responsibility could be fixed upon the principal or employer.

3rd. The principle, however, upon which this action is based, soon became an exception, recognized and approved by the courts, that the principal or employer is liable for injuries caused by the action or negligence of the contractor where the act or neglect which occasioned the injury results directly from the work which the contractor agrees, or is authorized by the employer, to do.

This classification of the authorities and these distinctions are discussed and recognized in *Ware v. Water Co.*, 2 Abb. (U. S. C. C.) 261; S. C. 16 Wall. 566. See also *Williamson v. Fischer*, 50 Mo. 198.

The entry by Singleton was an encroachment for which the company is responsible under the rule that all who instigate, promote, co-operate in or abet the commission of a trespass are guilty. *Williamson v. Fischer, supra*; *Ellis v. Sheffield Gas Co.*, 2 Ellis & Bl. 767; *Berry v. Fletcher*, 1 Dillon 67; *Carman v. S. & I. R. R. Co.*, 4 Ohio St. p. 418; *Treat v. Reilly*, 35 Cal. 129; *Green v. Kennedy*, 46 Barb. 16. And a corporation is liable where it ratifies a trespass. Hilliard on Torts, pp. 424, 425; *Fox v. Northern Liberties*, 3 W. &. S. 103; *Vanderbilt v. Richmond*, 2 Comst. 479; *Wilson v. Tumman*, 6 Mann. &. Gr. 236.

Hough, J.—In the year 1872 the plaintiff was tenant in possession of certain land in Buchanan county, belong-

ing to William Fowler. During the existence of the lease the defendant purchased of Fowler a right of way over said land, for the purpose of constructing thereon a branch railroad. There was no condemnation of the plaintiff's leasehold interest in that portion of the land over which the right of way was granted by Fowler, nor was said interest acquired by the defendant in any other manner. About the 1st of September, 1872, during the existence of the lease, James M. Singleton, under and by virtue of a contract made by him, with the defendant, to construct said branch road, entered for that purpose, with a force of men, upon the right of way aforesaid, and in the execution of said work, destroyed the crops of the plaintiff. Plaintiff instituted the present action to recover damages for the injuries thereby sustained, and obtained judgment in the circuit court.

The defendant resisted a recovery on the ground that the injuries were not inflicted by its officers, agents or servants, but by the servants and employees of the contractor, Singleton, who was exercising an independent employment, and who employed, paid and controlled the hands engaged upon the work. The right of way acquired by the defendant was subject to the leasehold interest of the plaintiff; it is clear that the defendant had no right to enter upon the land in question without the plaintiff's consent; and having no such right itself, it could confer none upon the contractor and his workmen. The contractor and his workmen were, therefore, trespassers, and having gone there at the instance and by the direction of the defendant, for the purpose of constructing its road, the defendant was also a trespasser with them, and as such was jointly liable for all damages directly resulting from the work done by them in the execution of the contract. *Williamson v. Fischer*, 50 Mo. 198. The case of *Clark v. The Hannibal & St. Jo. R. R. Co.*, 36 Mo. 202, cited by defendant's counsel, is not in point. In that case the defendant had acquired a complete and perfect right

to enter upon the land of the plaintiff and construct its road, and the trespasses and injuries complained of were committed by the servants and employees of the contractor who had engaged to do the work. It was held that the principle of *respondeat superior* applied to the contractor only, and not to the corporation.

If the defendant in this case could have lawfully entered upon the land of the plaintiff, that case would be decisive of this. But here the defendant was a joint tortfeasor with the contractor and his servants, and the principle of *respondeat superior* has no application. Finding no substantial error in the record, the judgment will be affirmed. All concur.

AFFIRMED.

BROWN v. MISSOURI, KANSAS & TEXAS RAILWAY CO., *Appellant.*

Railroad: AGENCY. No recovery can be had against a railroad company for drugs furnished to a person who has been hurt by the company's locomotive, on the order of a division superintendent of the road, without proof that he was authorized to give the order. The courts cannot take judicial notice of the duties of such an officer.

Appeal from Hannibal Court of Common Pleas.—HON. JOHN T. REDD, Judge.

John Montgomery, Jr., for appellant, cited *Tucker v. St. L. K. C. & N. Rwy.*, 54 Mo. 181; *Stephenson v. N. Y. & H. Rwy.*, 2 Duer 341; *Cox v. Midland Counties Rwy.*, 3 Exch. 268; Pierce on R. R. Law, 373.

NAPTON, J.—This was a suit originating in a justice's court for a small bill of drugs furnished a woman who had

been hurt by the locomotive or cars of defendant, and alleged to have been furnished at the request of defendant. The order to the druggist was given by Mr. Town, superintendent of the division of the road from Hannibal to Sedalia. No proof was offered as to the duties of such officer, and the courts cannot take judicial notice of them. The judgment for the plaintiff must be reversed, and the cause remanded. The other judges concur.

REVERSED.

RODNEY v. WILSON, *Admr., Appellant.*

Promissory Note: INDORSER'S LIABILITY: EVIDENCE will not be received for the purpose of showing that a payee of a promissory note who has transferred it by an indorsement in blank, verbally agreed at the time of making the indorsement to assume an absolute and unconditional liability, and not the liability simply of an endorser.

Appeal from Cape Girardeau Court of Common Pleas.—HON. H. G. WILSON, Judge.

J. B. Dennis and *R. L. Wilson* for appellant, cited Chitty on Bills, 645, 649; Greenl. Evid., §§ 275, 276; *Singleton v. Fore*, 7 Mo. 516; *Goodell v. Smith*, 9 Cush. 592; 2 Parson's Notes & Bills, 23, 122 note j, 123 note n; *Schneider v. Schiffman*, 20 Mo. 571.

James Mc Williams for respondent.

HOUGH, J.—On the 22nd day of June, 1866, one J. N. Whitelaw executed and delivered to the defendant's intestate, T. F. Rodney, as payee, a negotiable pomissory note for $3000, payable one day after date. On the 9th day of March, 1867, Rodney indorsed in blank and delivered said note, for value, to the plaintiff, Maria L. Rodney. It is

admitted that no demand was ever made of Whitelaw, or if made, no notice was ever given of a refusal to pay. The plaintiff sought to recover on the ground that T. F. Rodney, by his indorsement, assumed an absolute and unconditional liability, and not the liability simply of an indorser, and testimony was offered and admitted for the purpose of showing a contemporaneous verbal agreement that plaintiff should look alone to Rodney for payment, thereby virtually waiving the necessity for demand and notice, and thus varying the legal effect of the blank endorsement. The admissibility of such testimony is the only important question presented by the record. It has been repeatedly decided by this court that when a party writes his name upon the back of a note of which he is neither the payee nor indorsee, in the absence of extrinsic evidence he is to be treated as the maker thereof; but that parol evidence is admissible to show that he did not sign as maker, but as indorser, and that such was the understanding of the parties at the time. *Kuntz v. Tempel*, 48 Mo. 71; *Seymour v. Farrell*, 51 Mo. 95; *Mammon v. Hartman*, Ib. 169; *Calen v. Dutton*, 60 Mo. 297; *Chaffee v. R. R.*, 64 Mo. 195. While there is a *prima facie* liability as maker which the law has established for convenience, yet inasmuch as the undertaking is susceptible of a double interpretation, the law leaves the party at liberty, in certain cases, to show in what capacity he contracted. So under certain circumstances, the maker of a note will be permitted to show that his real relation thereto is that of a surety and not a principal.

Upon the precise question now presented, however, we have been unable to find any direct adjudication in this State. The authorities elsewhere are numerous, but irreconcilably conflicting, and without undertaking to review them, we will content ourselves with a brief statement of what we deem to be the correct view of the subject.

It is the generally received opinion that the legal import of every written undertaking is a part of the contract.

Now, being the payee of the note, Rodney could not, by simply writing his name on the back thereof, contract in any other capacity than that of indorser. As indorser, the law fixed his liability. That liability was to pay after demand and notice. *Light v. Kingsbury*, 50 Mo. 331. It is evident that the verbal contract on which the plaintiff relied, and the contract implied by the indorsement, are inconsistent with each other, and cannot stand together. One is an undertaking to be bound absolutely, the other an undertaking to be bound conditionally. The proof of the former has the effect of varying the latter. The rule is universal, that all prior and contemporaneous agreements are merged in the written undertaking. The contemporaneous parol agreement to be bound absolutely, that is, without demand and notice, must, therefore, yield to the agreement which the law declares arises out of the written indorsement, which is to be bound only after demand and notice. If the indorsee may thus qualify the legal effect of a regular blank indorsement, why may not the indorser be permitted, on the other hand, to escape all liability by showing that his indorsement was without recourse? *Charles v. Denis*, 42 Wis. 56; *Barry v. Morse*, 3 N. H. 132; *Bank of Albion v. Smith*, 27 Barb. 489; *Wilson v. Black*, 6 Blackf. 509; *Campbell v. Robbins*, 29 Ind. 271. Contra: *Barclay v. Weaver*, 19 Penn. St. 396. In all such cases as the present, we think the policy of the law requires that the paper "shall tell its own story."

We think, therefore, the testimony was inadmissible. Undoubtedly, after the obligation as indorser attached, it was competent for T. F. Rodney to waive by parol the necessity for demand and notice. This is conceded by all the authorities. On the case made by the pleadings and evidence the plaintiff was not entitled to recover. The judgment will be reversed and the cause remanded. All concur.

REVERSED.

Leabo v. Goode *et al.*, *Appellants.*

1. **Partnership**: RENEWAL NOTES: PAYMENT. The acceptance by a creditor of the note of an individual member of a firm after dissolution of the firm, in lieu of a matured note of the firm, is not an extinguishment of the firm debt, unless it is expressly agreed that it shall so operate.

2. ——: ——: PAYMENT BY SURETY. A surety on a note given after the dissolution of a firm, by one of the members of the firm in renewal of a note of the firm, on which also he was surety, may recover of the other member of the firm money which he has paid in discharge of the renewal note.

3. **The Granting of a continuance** rests largely in the discretion of the trial court, and every intendment is made in favor of its ruling. Its discretion must appear to have been unsoundly exercised before it will be interfered with by the Supreme Court.

   The affidavit filed in support of the application for continuance in this case examined and *held* insufficient.

4. **Instructions**: ESTOPPEL: PRACTICE. When a party asks instructions upon one theory of his case only, seemingly abandoning another which he has set up in his pleading, the Supreme Court will not grant him a reversal because the trial court failed to instruct the jury upon that theory.

Appeal from Moniteau Court of Common Pleas.—Hon. Geo. W. Miller, Judge.

Owens & Wood for appellants.

1. The affidavit for continuance showed sufficient cause. 2. The instruction given at the instance of respondent was clearly erroneous, because it was decisive of the case, and excluded entirely from the consideration of the jury the questions raised by the evidence of appellant. *Clark v. Hammerle*, 27 Mo. 55; *Sigerson v. Pomeroy*, 13 Mo. 620; *Mead v. Brotherton*, 30 Mo. 201; *Rapp v. Vogel*, 45 Mo. 524. 3. The instructions asked by appellants should have been given. *Moore v. Lackman*, 52 Mo. 323; *Powell v. Charless*, 34 Mo. 485. 4. The taking of the individual notes of partners or joint debtors, will discharge the others,

when so agreed. *Maxwell v. Day*, 14 Am. Law Reg. 59; Ib., 45 Ind. 509.

Draffen & Williams and *Baird* for respondent.

1. The application for a continuance was properly overruled. *Frederick v. Rice*, 46 Mo. 24; *Farmers and Drovers Bank v. Williamson*, 61 Mo. 259. 2. There was no evidence whatever that the different renewals of the note were intended as payment of the same and in satisfaction thereof. *Appleton v. Kennon*, 19 Mo. 637; *Howard v. Jones*, 33 Mo. 583; *McMurray v. Taylor*, 30 Mo. 263; *Powell v. Charless*, 34 Mo. 485; *Yarnell v. Anderson*, 14 Mo. 619; *Boatmen's Saving Institution, v. Mead*, 52 Mo. 543; *Garner v. Hudgins*, 46 Mo. 399. 3. It was not claimed that Cochell was liable upon the note executed after the dissolution of the partnership, but that he was still liable upon the old debt which was not satisfied and paid by the new note.

Norton, J.—This is an action to recover money alleged to have been paid by plaintiff, as security for defendants. Judgment by default was had against Goode. Cochell filed answer, and upon trial judgment was rendered against him, from which he has appealed to this court. It appears to be admitted by the pleadings that, in the month of November, 1870, defendants were partners under the name of M. Goode & Co., and that the partnership continued till the 1st of February, 1872; that on the 29th of November, 1870, defendants, under the name of M. Goode & Co., executed their note for $600, in which they were both principals and payees, and that plaintiff and one Marles signed the note as their sureties, and that defendants, on the same day, indorsed and discounted the note at the bank of California, and received the money on the same; that said note was renewed by said defendants, with plaintiff as security, from time to time, till the 26th of November, 1871, at which time it was again renewed by defendants as princi-

pals, and Leabo as surety. The evidence tended to show that this note was again renewed in February, 1872, after the dissolution of the partnership between defendants, and that the renewal note was executed by defendant, Goode, and plaintiff as surety, and that it was renewed from time to time, till, in the year 1873, it was paid by plaintiff. The evidence also tended to show that when the note was renewed in February, 1872, plaintiff knew of the dissolution of the partnership. It is insisted that the judgment should be reversed because of the refusal of the court below to continue the cause on defendants' application, and because error committed in giving and refusing instructions. The court gave an instruction telling the jury that the facts above stated, as admitted, were confessed by the pleadings, and also the following on the part of the plaintiff; that if they further believe, from the evidence, and so find the facts to be, that the said note, so indorsed and discounted to the Bank of California by M. Goode & Co., as principal, and the said Leabo as security, was afterwards renewed on the 24th day of February, 1872, and that the same was renewed, from time to time, till and including a renewal on the 18th day of February, 1873, by the said M. Goode, as principal, and the said Leabo, as security, then the jury are instructed that if they believe, from the evidence, that the renewal by Goode, as principal, was for the same debt that was contracted by M. Goode & Co., it is wholly immaterial, so far as the rights of the plaintiff, Leabo, are concerned in this suit, whether the said renewals were made by M. Goode & Co., or by M. Goode. And should the jury further believe, from the evidence, that the money received by M. Goode & Co., from their discounting of the first note to the bank of California, was used by them in their co-partnership business, and that the said Leabo paid off and discharged the said debt so created, by paying off to the said bank the said last renewal note, then the jury should find for the plaintiff.

It is insisted by defendants that the renewal of the

note of M. Goode & Co., on which plaintiff was bound as security, by M. Goode in February, 1872, was a payment of the debt of M. Goode & Co., and that by the execution of this note by plaintiff, he became the security of M. Goode alone, and the subsequent payment of the debt by plaintiff created no liability on the part of defendant Cochell. We do not think this proposition tenable. The proof shows that the debt when created, was a firm debt, that the money procured on the note was used by the firm in its business, and that plaintiff was a security for defendants as partners. The substitution of the note of M. Goode with plaintiff as security, in renewal of the note of M. Goode & Co., or by way of continuing the debt, did not, from the bare receipt of it by the creditor, become a payment of the firm debt. The acceptance of the note, to amount to payment, must be taken expressly as payment by the agreement of the parties. It is not an extinguishment of the debt until it is paid, and then it becomes full payment. This doctrine is fully recognized and plainly stated by this court in the case of *Appleton v. Kennon*, 19 Mo. 637, and cases there cited.

1. PARTNERSHIP: renewal notes: payment.

Applying the principle above stated to the case at bar, and a solution of the question presented is attainable. The debt created in 1870, for the payment of which plaintiff was bound as security, was the debt of M. Goode & Co., and remained their debt till it was paid. If the note given in 1872 to the bank and signed by Goode alone and plaintiff as security is to be considered as a payment and extinguishment of the debt evidenced by the note of M. Goode & Co., from the bare fact of its reception, then Cochell is discharged from all liability to plaintiff. But, in the absence of evidence showing that by agreement of the bank and Goode it was accepted in payment of the original debt, and was so intended at the time, in the language of Judge Ryland in the case *supra*, it is but payment *sub*

modo; it is not an extinguishment or satisfaction of the debt until the note be paid.

It follows then necessarily, in this case, that if the debt of Goode & Co. was neither extinguished nor satisfied till the actual payment of the note signed by Goode alone and plaintiff as security, the defendant is liable to plaintiff in this action. The debt of Goode & Co., on which plaintiff was bound as surety, continued to exist as their debt, and it only became satisfied by the payment made by plaintiff, and, if so paid by him, we cannot see on what principle his right to recover of defendant, Cochell, can be denied. It will not be pretended that, if plaintiff had paid the note of Goode & Co. at the time it matured in 1872, on the last renewal of M. Goode & Co., he could not have maintained his action and recovered from Cochell the amount so paid, notwithstanding the dissolution of the partnership of Goode & Co. Nor do we see how the substitution of the note of Goode and plaintiff, by way of renewal or continuation of the debt, could change his rights, if the debt of Goode & Co. was only satisfied by the payment of the substituted note. This payment if made by plaintiff was made to satisfy, and did satisfy a debt for which defendant, Cochell, was at the time liable, and for the payment of which plaintiff was his security.

2. ——: ——: payment by surety.

In the case of *Powell v. Charless' Admr's.* 34 Mo. 485, it was held that after the dissolution of a partnership the execution by one partner of a new note, even though the old note be surrendered at the time, does not raise a legal presumption of an agreement to extinguish it, and discharge the legal liability of the other partner. "Nor in the absence of an express agreement is it competent for the court to instruct the jury that any fact or facts, alone, unconnected with a consideration of the intention or animus of the parties will constitute an agreement. The burden of establishing an agreement for the extinguishment of the old note devolves on the party who sets it up."

The instructions complained of presented the case in accordance with the above views, and no error was committed in giving them.

On the part of defendant, the court instructed the jury that it devolved on the plaintiff to show by a preponderance of evidence, that he has been compelled to pay, and has paid money as security for the firm of M. Goode &. Co., of which defendant was a member, and in the absence of such proof, they will find for defendant as to first count. The court refused nine other instructions asked by the defendant, which is assigned for error. The same proposition embodied in the instruction above quoted, was contained in the third, fifth, sixth and ninth instructions, and they were for that reason properly refused.

The fourth instruction asked the court to declare, "that defendant Goode, after the dissolution of the partnership, could not bind his former co-partner by the execution of a note in renewal of a note signed by the firm, while the co-partnership existed." This instruction asserted a correct principle of law, and if the action of plaintiff had been founded on such a note, the defendant, Cochell, could not have been made liable, and the instruction would have been applicable. It is sought in this suit to make defendant, Cochell, liable on the original debt, which it was alleged still existed, notwithstanding the execution of the note of Goode. The second, seventh, eighth and tenth instructions, which substantially asked the court to declare, that if defendant Goode paid off the note of M. Goode & Co., they would find for defendant, were properly refused. There was no evidence that Goode paid off the original debt evidenced by the note of M. Goode & Co., further than the execution of the note of Goode and the surrender of the note of Goode & Co., and this, as we have seen by the cases referred to, does not amount to payment so as to discharge or satisfy the original debt, in the absence of any agreement to accept it as a payment or discharge of the debt. If the instructions had been framed

so as to have required the jury to find for defendant, if they believed from the evidence that the note made by Goode and plaintiff was accepted by the creditor in payment and discharge of the original debt, and that it was so agreed at the time, they should have been given. This question was ignored in the instructions and, framed as they were, they were calculated to mislead, and were rightly refused.

It is further insisted that the court improperly overruled defendants' application for continuance. The granting of continuances rests largely in the discretion of the court before which it is made, and every intendment is made in favor of the ruling of the court below. Before this discretion will be interfered with, it must appear to have been unsoundly exercised. The affidavit for continuance is based upon failure to procure the evidence of a witness who resided in Mexico, Audrain county. It alleges that notice was given to take his deposition in sufficient time to be used on the trial, and that his deposition was not taken because he did not appear on the day fixed in the notice. The affidavit does not state the date of the notice, nor the day on which it was to be taken, nor that a subpœna had been issued by the notary to procure the attendance of the witness, nor does it state that after failure to take the deposition on first notice, there was not sufficient time to give another notice and take it. It is also stated as another ground for continuance, that it was agreed between plaintiff's attorney and defendants' attorney that the written statement of a witness, without regard to form, should be taken and used on the trial, that the statement was taken and given to plaintiff's attorney to file, and that defendant supposed it had been filed, and was with the papers in the cause till it was called for trial, when he found it was lost. The affidavit as to second cause assigned for continuance is insufficient in not stating that defendant knew of no other witness whose attendance he could procure by whom he could

8. THE GRANTING OF A CONTINUANCE.

prove the same he expected to prove by the lost statement. We therefore conclude that the discretion of the court was not unsoundly exercised in refusing the continuance. Judgment affirmed, in which the other judges concur.

AFFIRMED.

On Motion for Re-hearing.

We are asked to grant a re-hearing in this case on the alleged ground that the affidavit for continuance was not duly considered, and because the point relied upon by defendant that the instructions given for plaintiff did not cover the whole case, was overlooked. As to the first ground, we have nothing more to say than is said in the opinion delivered, and repeat that that affidavit fails to disclose such diligence as would justify an interference with the discretion of the court in overruling the application.

As to the other ground, the record before us shows that in the court below the case was tried on the theory that defendant was not liable on the demand sued upon, because the money paid by plaintiff was paid on the individual debt of Goode, and not on the partnership debt of Goode & Cochell. The thirteen instructions asked by defendant show this and amounted to an abandonment of what he now claims was set up in his answer, as off-set or counter-claim. While, as decided in 27 Mo. 55, it is the duty of the court in giving instructions to embrace the whole case, and a defendant is not bound to ask instructions, it does not follow that, where he does ask instructions and leads the court to believe that he has abandoned a defense set up, it would be reversible error in the court if it did not instruct in regard to such defense. Besides this, there was no evidence in regard to the counter-claim of $10, nor was there any tending to establish that the $40, which it was alleged plaintiff owed Goode, was by agreement to be credited on the note. The alleged payment made by Winger, the assignee of

4. INSTRUCTIONS: estoppel: practice

Goode, to plaintiff, was set up by defendant in his answer in connection with the fact that the plaintiff had proved his claim before the assignee, by way of estoppel. This defense was also ignored by defendant in the instructions asked, as it might well have been under the evidence. The practice is to be condemned of a party standing by and asking instructions upon a theory on which he relies, and seemingly abandoning another which he has set up in his answer, and, when beaten, bringing his case here and asking a reversal, because the court did not, of its own motion, or at the request of the opposing party, instruct on such abandoned theory. Such practice is justly condemned in *Henslee v. Cannefax*, 49 Mo. 296, and *Harris v. Hays*, 53 Mo. 90.

MOTION OVERRULED.

WRIGHT, *Appellant*, v. MCCULLY

Statute of Frauds: CONTRACT: EVIDENCE. A being a creditor of B and also debtor to C in an equal amount, it was verbally agreed by way of settlement among them, that B should pay C what he owed A. *Held*, that this agreement was not within the statute of frauds, and was binding.

An order having been drawn by A upon B in favor of C, to carry out such an agreement, *Held*, admissible in evidence to show the exact amount B had assumed to pay.

Appeal from Macon Circuit Court.—HON. JOHN W. HENRY, Judge.

A. R. Pope for appellant.

The order was a bill of exchange within the meaning of the law, and its acceptance, in order to bind the acceptor, must have been in writing signed by him, or some one by him authorized. 1 Parsons on Bills, pp. 52, 56; Gen.

Stat. of 1865, p. 395; Smith Merc. Law, pp. 298–9; *Rousch v. Duff*, 35 Mo. 312. The debt was that of a third party, and, in order to make plaintiff responsible, his acceptance must have been in writing, and there must also have been a consideration. Browne on Stat. Frauds, pp. 409, 410; Smith Merc. Law, pp. 564–5–6, 575.

John F. Williams for respondent.

NAPTON, J.—This was an action on an account, to which the defendant set up a counter claim of $40.75, and the plaintiff replied denying this claim. The finding of the court, to whom the case was submitted, was in favor of the counter claim, and a judgment given for defendant for $15.67. The only point of objection to this judgment is, that the order given the defendant by a creditor of the plaintiff, not having been accepted in writing by the plaintiff, was not binding; but it appeared in this case that all three of the parties, plaintiff, defendant and the plaintiff's creditor, met together, and that it was agreed between them that the plaintiff could pay to defendant the debt he owed to the third person, who was a debtor of defendant to the same amount. Such an agreement, though verbal, is not within the statute of frauds. *Black v. Paul*, 10 Mo. 104. The order in this case was not the foundation of the action, but merely admitted to show the exact amount assumed by the plaintiff. All concur, except HENRY, J., not sitting. Judgment affirmed.

AFFIRMED.

THE STATE v. ENGLISH, *Appellant.*

1. **Evidence**. Upon the trial of a person jointly indicted with another, the prosecution will not be permitted to show that the latter is in the penitentiary of another State.
2. ——. When the prosecution has given evidence tending to prove that the defendant went to the place where the crime was committed for the purpose of committing it, the defendant will be allowed to show that he went thither on legitimate business.
3. **Evidence** that the defendant stole property of Peter Sinish will not sustain an indictment for stealing property of John Peter Sinish.

Appeal from Cole Circuit Court.—HON. GEORGE W. MILLER, Judge.

Lay & Belch for appellant.

J. L. Smith, Attorney General, for respondent.

There was no error in permitting the witness to state the whereabouts of Moore.

He was indicted as principal, and the defendant as being present, aiding, abetting and assisting him; the evidence clearly shows that Moore committed the larceny; that he and defendant were seen to leave California together, riding horses belonging to defendant, and were seen in the neighborhood of the house where the larceny was committed, and were seen together in the evening of that day in California, and on this evidence the inquiry that naturally would present itself to the mind of an average juror, is, "where is Moore, and why don't the State arrest and prosecute him?" That question would remain unanswered, and however much it might be contrary to their duty, some of the jurors would beyond question be influenced by that fact to acquitting the defendant, not desiring to punish one of the parties to a crime, so long as the other remained unpunished. To obviate this prejudice against the State, it was most certainly proper

to prove that it was not within the power of the State to arrest and prosecute Moore. It could not possibly prejudice the defendant; it did not tend to prove defendant's bad character, and the real objection to the same was that it took away from him an argument before the jury to which he was not entitled.

NORTON, J.—At the May term, 1876, of the circuit court of Cole county, the defendant was indicted jointly with one Mack Moore, for grand larceny, and for receiving stolen property, knowing the same to have been stolen.

The first count of the indictment charged that Moore "did feloniously steal, take and carry away thirty-five dollars, one note, one twenty dollar bill, one ten dollar and one five dollar bill, lawful money of the United States, of the value of thirty-five dollars, then and there the property of John Peter Sinish," and the defendant was present aiding, abetting, assisting and maintaining the said Mack Moore, the felony and larceny to do and to commit," &c. The second count charged that Joseph English and Mack More on, &c., at, &c., thirty-five dollars, to-wit: one twenty dollar bill, one ten dollar and one five dollar bill, lawful money of the United States of the value of thirty-five dollars, the property of one John Peter Sinish," therefore stolen, did receive and have in their possession, well knowing it to have been so stolen. Defendant was tried, convicted and sentenced to two years imprisonment in the penitentiary.

The case is here by appeal, and a reversal of the judgment is sought for alleged error in receiving and rejecting evidence, and in giving improper instructions. On the trial a witness on behalf of the prosecution was asked to state where Moore, who was jointly indicted with defendant, was, and the objection of defendant thereto being overruled, he answered that he understood he was in the Texas penitentiary. This evidence we think was not admissible. It could have had no other tendency than to

prejudice the cause of defendant before the jury, and had no relevancy to any issue in the case. The conviction of defendant was sought by the State upon evidence purely circumstantial, and we cannot estimate the effect which the answer may have had on the jury in determining the question of defendant's guilt.

The defense offered to show that, on the day the larceny was alleged to have been committed, defendant had business which caused him to go in the neighborhood where Sinish lived. This the court refused to allow. The theory on which the State proceeded, as the evidence shows, was that English left the town of California that morning, which was several miles from the house of Sinish, in company with Moore to commit the larceny, and we think he should have been allowed to show that his mission to the neighborhood was legitimate business, and that his purpose in going thither was an honest one, if such were the facts, and, more especially, as the evidence discloses the fact that he was not in the house of Sinish when Moore committed the larceny nor in the immediate vicinity.

The sixth instruction given on behalf of the State tells the jury that, if they believe that Moore assaulted Mrs. Peter Sinish in her house, and by force took from her money of the value of $20, and that the same was the property of Peter Sinish, and that defendant aided and abetted said Moore, they would find defendant guilty on the first count of the indictment.

This count charges that the property stolen was the property of John Peter Sinish, and the jury are authorized by the instruction to convict, if they find the property stolen to be the property of Peter Sinish.

Under the indictment defendant could only be convicted for stealing the property of John, and not the property of Peter Sinish. *State v. Fay*, 65 Mo. 490. For the errors above mentioned, the judgment will be reversed

and cause remanded, in which the other judges concur.

REVERSED.

STATE *ex rel.* CLARK v. GATES.

1. **Public Officers**: JUDICIAL NOTICE will be taken of the powers and authority of public officers when they are prescribed by law. They need not be pleaded.
2. **Implied Powers of Public Officers.** Where an agent is clothed with general powers, the means and measures necessary to carry them into effect are also granted; and this principle is applicable to public as well as private agents.
3. **The State Treasurer** may pay a demand upon the treasury by a check upon a bank where he has money on deposit, that mode of payment being in accordance with immemorial commercial usage.
4. **Bank Check for Public Funds**: PRESENTMENT FOR PAYMENT. When a county treasurer receives from the State treasurer a bank check for money due from the State to the county, it is his duty to make presentment for payment within a reasonable time, and if he neglects to do this, and before the check is paid the bank fails, the loss will fall upon himself.
5. **State Treasurer**: SECURITY FOR STATE DEPOSITS IN BANK: COUNTY TREASURER: FAILURE TO PRESENT CHECK. The fact that a State treasurer has failed to comply with that provision of the constitution of 1875 which requires him to take security for State funds deposited in bank, will not relieve a county treasurer who has received a bank check from him in payment of money due from the State to the county, from personal liability incurred by failure to present the check in time.

Mandamus by Clark, the treasurer of Osage county, to compel Gates, the State Treasurer, to pay to Osage county her proportion of the State school funds for the year 1877.

Lay & Belch with *R. S. Ryors* for relator.

1. Section 145, p. 1187, 2 Wag. Stat., was rendered

nugatory by the adoption of Sec. 15 of Art. 10 of the constitution of 1875. Lambeth was not bound to use the diligence required in ordinary cases, because the failure of the bank could not work a loss of the special deposits of the State funds. He could not presume that the bank would in violation of law use the funds in its ordinary business, and if a bond was taken, as provided by the constitution, no loss has been sustained. *Ray Co. v. Bently*, 49 Mo. 236.

2. The State Treasurer had no right to draw his check in discharge of his obligation to pay the warrant drawn on the school money apportioned to Osage county. It is not averred that Lambeth received the check in payment of that money; and, even if it was so averred, Lambeth had no authority to make such agreement, or to receive the check in payment. No loss is averred. The following authorities fully bear out our position, that officers or agents of a political or public corporation are confined strictly to the power prescribed by the law, and all persons dealing with them must know the extent of their authority. *Miller v. Iron Co.*, 29 Mo. 122; *State v. St. Louis Co.*, 34 Mo. 546; *Cheeney v. Brookfield*, 60 Mo. 53; *Kiley v. Oppenheimer*, 55 Mo. 374; *Ceart v. Cogill*, 6 Mo. 316; *Stillwell v. Craig*, 58 Mo. 30; 15 Mo. 604; *Maguire v. State Sav. Ass.*, 62 Mo. 349; Story on Agency, Sec. 11; Dillon on Mun. Corp., Sec. 372; *Baltimore v. Eschbach*, 18 Md. 276; *Thurston v. Magnolia*, 1 Bond (Dis. of Ohio).

The Government is not bound by the declaration of an agent, unless it manifestly appear that he acted within the scope of his authority. *Whiteside v. United States*, 93 U. S. 247; *Mayor v. Eschbach*, 17 Md. 282: Story on Agency, 307; *Lee v. Munroe*, 7 Cranch 376; *State v. Hayes*, 52 Mo. 578; *Gibbons v. U. S.*, 8 Wall. 274; *U. S. v. Rhame*, Int. Rev. Rec. 235. When an attorney has authority to receive payment, he cannot receive anything but money. *Willey v. Greenfield*, 30 Me. 452; *Holt v. Storris*, 7 Wis. 253; *Higgins v. Moore*, 34 N. Y 417; *McCullock v. McKee*,

16 Penn. St. 289; *Marion Co. v. Moffitt*, 15 Mo. 604; *Riley v. Second Bank*, 53 Barb 228; *Downey v. Hicks*, 14 How. 240; *Ward v. Smith*, 7 Wall. 447.

Ewing & Pope for respondent.

This is a controversy between two public officers, both bonded, and the question is, which shall lose the money, he who did his whole duty, or he who acted negligently. The one paid the money exactly as directed by the other. The treasurer has authority of law for keeping money in a St. Louis bank on deposit to his credit. Acts of 1877, p. 383, § 17; 2 Wag. Stat., p. 1187, § 145.

SHERWOOD, C. J.—In the manner provided by law the county court of Osage county, in March, 1877, entered an order directing the State Auditor to draw his warrant on the State Treasurer for the sum of $3,198.50, this being the amount ascertained to be due that county as its proportion of the public school fund for that year. The warrant was accordingly drawn, payable to Lambeth, then county treasurer, and presented to the State Treasurer, who, in compliance with the request and direction of Lambeth, "to send by check" on a bank in St. Louis, payable to his order, took up and paid the warrant by sending to Lambeth, in accordance with his request, a check for the amount due; which check was made payable to the order of Lambeth, at the National Bank of the State of Missouri, a bank in the city of St. Louis, at which the State Treasurer had ample funds to meet the check. Lambeth received the check in due course of mail, but negligently and carelessly retained it in his possession, never presenting it for payment, either before or after that bank suspended payment, which suspension occurred June 19, 1877, forty days after the reception by Lambeth of the draft, although an amount amply sufficient to meet the check was on deposit to meet the same, and still remains deposited in the bank; nor did Lambeth's successor in office ever present

the check for payment. At the time the State Treasurer drew the check he had, in conformity to law, designated the National Bank aforesaid, as the one where the revenues of the city of St. Louis due to the State should be deposited; and in pursuance of such designation the collector of said city, had deposited a large amount of the revenues due the State, at the bank where the check was drawn. There was also, when the check was drawn, deposited in such bank, by Mercer, the late State Treasurer, over $200,000, which was received by the present State Treasurer as money on deposit due the State. In consequence of the failure to present the check, the amount thereof has been lost to the State. The foregoing allegations are, by the demurrer which questions the sufficiency of the State Treasurer's return, confessed to be true, and we do not see that the stipulation filed herein by the parties, at all affects the status of this case, or materially alters the salient features presented by the return. It is urged, in objection to the return, that it does not show that the amount due has been paid, or that the State Treasurer was authorized to draw, or the county treasurer authorized to receive, the check given in payment. The fact of payment is sufficiently averred, so that the only question for consideration is one of bare authority in giving and in the reception of the check.

1. PUBLIC OFFICERS: judicial notice.

Relative to public officers, whose authority and powers are prescribed by public law, we take judicial cognizance, and no necessity exists to set forth such authority. Thus a sheriff may aver that he levied a writ of execution, or made a sale thereunder, without averring that the law gave him authority to make either the levy or the sale, and if a question arises as to the manner of performing either of the above named or other official acts, and such method of performance is pleaded, it then becomes the duty of the court to determine whether the pleadings show that the law has met with compliance in the given instance.

This duty devolves on us in the case at bar. If there is one principle in the law which finds abundant and oft repeated recognition, it is this: that where an agent is clothed with general powers, the means and measures necessary to effectuate the powers granted, attend the grant of authority as inevitable incidents, (*Edwards et al. v. Thomas et al.*, 66 Mo. 468). Thus, an agent employed to get a bill discounted may, unless expressly restricted, endorse it in the name of his employer; a broker employed to effect a policy of insurance may adjust the loss and do all that is requisite towards such adjustment; an agent employed to issue process may receive the debt and costs, and, in general, an agent has implied authority to use those means of which the principal could not but have foreseen the necessity, and therefore could not but have intended to authorize. (Smith Merc. Law, 175, 176, and cases cited); and the same principle which applies to private agents is equally applicable in this regard to public ones. In the Floyd acceptances (7 Wall. 666), so confidently relied on by relator, the point in judgment was, that the Secretary of War, Floyd, had, as such secretary, no authority whatever to bind the Government of the United States, by accepting bills of exchange drawn on and accepted by him as Secretary of War; and therefore, that even purchasers before maturity of such acceptances, had no right of recovery against the Government. But while holding this view, Mr. Justice Miller expressly says: "The authority to issue bills of exchange not being one expressly given by statute, can only arise as an incident to the exercise of some other power. When it becomes the duty of an officer to pay at a distant point, he may do so by a bill of exchange, because that is the usual and appropriate mode of doing it. So when an officer or agent of the Government at a distance is entitled to money here, the persons holding the fund may pay his draft, and whenever the drawing of a bill of exchange is the appropriate means of doing that which the department or officer

2. IMPLIED POWERS OF PUBLIC OFFICERS.

having the matter in charge, has a right to do, then he can draw and bind the Government in doing so."

Here the right and duty of Treasurer Gates to make the payment, are conceded by the very form of this proceed-

3. THE STATE TREASURER.

ure; the only point of contest being the mode he saw fit, at the request of Lambeth, to employ. If the authority furnished us by relator is to be our guide, the right to do the act carries with it in its train the usual mode of accomplishing the object sought. Can it be seriously contended that payment by check, where one has money deposited, is not in strict accordance with immemorial commercial usage? Manifestly not. This being the case, no room, it would seem, can be left to doubt the lawfulness of the method of payment adopted by respondent. To deny this, to assert the contrary doctrine, would be equivalent to saying that no payment by the State Treasurer short of the actual delivery of the money to the party entitled thereto, would be valid in law. We cannot tolerate such an idea. To hold in this way would be to seriously retard, if not to absolutely cripple the business facilities both of State and county officials. If lawful for the State Treasurer to pay by check, then also lawful for the County Treasurer to receive payment by the same medium.

The payment being lawful, and the parties occupying the same plane as private individuals engaged in a similar transaction, as we think has been successfully established, the only remaining point is, on whom is the loss, which the pleadings admit has occurred by reason of non-presentation of the check for payment, to fall? The rule is well settled that if any individual holder of a check does not present it for payment within a reasonable time, and any loss occur in consequence of his laches, he alone must bear it. No sound reason can be urged why the same rule should not apply to instances like the present. The check in question, was never presented, and not the slightest semblance of an excuse is

offered for the strange neglect. On whom, then, is the loss consequent upon such neglect to fall? On this point our own reports furnish authority in support of the foregoing views. In *Chouteau v. Rowse*, 56 Mo. 65, a tax-payer had funds in bank sufficient to pay his taxes, and being called upon by the collector, gave his check for the amount. The collector failed to present the check; meanwhile the bank failed, the collector returned the taxes delinquent and the tax-payer was compelled to pay the taxes again, and it was held that he could recover from the collector the amount of the check. That case must be held decisive of this. No express or statutory authority can be found which gives permission to a collector to receive payment by check, or to the State Treasurer to make payment in that way; and the case just mentioned can only be upheld on the ground already announced, that if the power to perform an act be granted, the grant bears with it, as a logical sequence, the usual means, measures and modes of carrying the power into execution. In the case above cited, we held that as the collector failed to present the check, he made the debt his own, and as we fail to discover any sound reason for distinguishing this case from that, we make the same ruling in regard to the county treasurer, holding, as we do, that to rule otherwise, to permit the county treasurer to retain in his possession a check on a solvent bank until insolvency and consequent loss occurs, and then to cast that loss on the shoulders of the respondent, who has been without fault, would be to give sanction to a practical fraud, and legal validity to nothing short of the grossest injustice.

We have been able to discover no insuperable antagonism between the constitutional and statutory provisions referred to, nor, if there were, what bearing it would have in the present instance. There is nothing in the return showing any failure to perform official duty on the part of respondent in respect to the provisions of the constitution,

5. STATE TREASURER: security for state deposits in banks: county treasurer: failure to present check.

whereon relator relies, and we certainly will not gratuitously presume any such dereliction of duty. Conceding then, that respondent has complied with the constitutional requirements, we do not see that such concession betters the plight of relator; because, in that event, he would not be entitled to the extraordinary remedy he now seeks until respondent had recovered on the security given by the bank of deposit. If, on the other hand, the constitutional provision has not met with compliance, still the admitted fact remains that through the palpable neglect of the county treasurer, the loss occurred. It does not, therefore, concern relator, so far at least as relates to the present proceeding, whether respondent did what is alleged to be his duty under the constitution or not. If it was his duty and he performed it, that performance puts an interdict on the present proceedings being successful. If, on the contrary, he did not perform his alleged constitutional duty, the all-sufficient answer is that no loss occurred by reason of non-performance, but only by reason of the non-presentation of the check whereby the county treasurer made both the debt and the loss his own. Viewing the matter in this light, we deny the peremptory writ. All concur.

PEREMTORY WRIT DENIED.

BOWMAN'S CASE.

1. **A Writ of Prohibition does not lie** to arrest a proceeding at law for defect of parties; as when a suit which should be brought in the name of the State is brought in the name of private persons.
2. **A Judge is not Disqualified** to sit at the trial of a case instituted by persons composing a committee of a corporation by reason of the fact that he is an honorary member of the corporation.

Information for a Writ of Prohibition.

Proceedings were instituted in the circuit court of the

city of St. Louis, before the Hon. Wilbur F. Boyle, one of the judges, upon an information filed by Alex. Martin, Edmund T. Allen, E. C. Kehr, Enos Clarke and Joseph G. Lodge, composing the committee of prosecution of the Bar Association of St. Louis, charging the petitioner, Frank J. Bowman, with mal-practice, deceit and misdemeanor in his professional capacity as an attorney at law. Upon a trial before a special jury there was a verdict of guilty, and Judge Boyle was about to pronounce sentence when this information for a writ of prohibition was sued out against him in order to arrest the proceeding. The Bar Association was an incorporated association of attorneys, and Judge Boyle was an honorary member. His status as such was defined by the following article in their constitution: "Any member of the association who may be, or become a judge or justice of any court of record, shall be, and while he shall hold such office, continue an honorary member of the association, and shall be entitled to all its privileges, except that of voting, without payment of annual dues."

Wagner, Dyer & Emmons for the petitioner, argued that the writ would lie, citing *Howard v. Pierce*, 38 Mo. 298; *State v. Clark Co. Ct.*, 41 Mo. 44; Whittlesey's Practice, p. 631.

2. Judge Boyle was disqualified to sit. Freeman on Judgments, § 144; Broom's Legal Maxims, 117, *et seq*; *Dimes v. Pro. Grand Junc. Canal*, 3 H. L. Cas. 759; Cooley Const. Lim., (3 Ed.)410, 411, 412, 413 and notes; *Richardson v. Wallace*, 6 Cush. 332; *Sigourney v. Libby*, 21 Pick. 106; *Oakley v. Aspinwall*, 3 N. Y. 547; *Washington Ins. Co. v. Price*, Hopkins Ch. 1; *Pierce v. Atwood*, 13 Mass. 340; *Commonwealth v. McLane*, 4 Gray 427.

3. Many authorities were cited to show that the proceeding against Bowman should have been brought in the name of the State and not in the name of the individuals composing the committee of prosecution.

Robert S. McDonald and *H. J. Grover* for petitioner.

1. The proceedings were not commenced for the redress of any private wrong or injury, or for the recovery of damages to any aggrieved party. They were in the nature of a public prosecution and should have been instituted in the name and on account of the State, and by its proper officer.

2. The judge before whom the proceedings were had, was interested in the association by which they were instituted and conducted; as a member of the association he was interested in their success, and would have been more or less injuriously affected by their defeat, and was therefore disqualified to act.

3. The petitioner being duly sworn and enrolled as an attorney of this court, is one of its officers, and is entitled to its protection in the enjoyment of his said office and its privileges, and if illegally or improperly proceeded against before an inferior tribunal is entitled to the interposition of this court by the writ of prohibition prayed for.

4. Section 30, article 2, of the constitution of this State provides, "that no person shall be deprived of life, liberty or property without due process of law." It will not be contended that a person can be deprived of the right of earning a livelihood by the practice of his profession except by such due process. If, therefore, the court is of opinion that due and proper proceedings have not been had in this case, it is within its power and province to issue its writ of prohibition as prayed for, and thereby protect the petitioner in his constitutional rights, this court having, by the provisions of section 3 of article 6 of the constitution, "a general superintending control over all inferior courts."

Chester H. Krum and *Alex. Martin, contra,* argued that

the writ would not lie, citing *Thomas v. Mead*, 36 Mo. 233; *Vitt v. Owens*, 42 Mo. 512; *Howard v. Pierce*, 38 Mo. 298; *Wilson v. Berkstresser*, 45 Mo. 283; 9 Sm. & Mar. 623; 4 Rich. 513; 7 Wend. 518; 23 Ala. 94; *Bartling v. Jamison*, 44 Mo. 141.

2. The proceeding was properly brought in the name of the relators. No statute requires it to be brought in the name of the State, nor was it necessary at common law. For the modes of proceeding in order to secure the disbarment of an attorney for unprofessional conduct. See *In re Percy*, 36 N. Y. 651; *In re Cooper*, 22 N. Y. 68; *In re Peterson*, 3 Paige 510; *Anon.* 22 Wend. 655; *Saxton v. Stowell*, 11 Paige 526; *Matter of Miles*, 5 Dayley N. Y. 465; *In Matter Cameron* 5 Hun New York 290; *In re Kelly*, 59 N. Y. 595 and 62 N. Y. 198; *Penobscot Bar v. Kimball*, 64 Me. 140; *Matter of Mills*, 1 Michigan 392; *Mater of Balus*, 28 Mich. 392; *Matter of Peyton*, 12 Kansas 398; *Ex parte Smith*, 28 Ind. 47; *Reilly v. Cavanaugh*, 32 Ind. 214; *Klingsmith v. Kepler*, 41 Ind. 341; *Turner v. Commonwealth*, 2 Metc. (Ky.) 619; *Ex parte Brown* 1 How. (Miss.) 303; *Ex parte Heyfron*, 7 How. (Miss.) 127; *Ex parte Michael D, Armas* 10 Martin (La.) 123; *Ex parte Schunk*, 56 N. C. 353; *Austin's case*, 5 Rawle 191; *Dickens' case*, 67 Penn. 169; *Ex parte Carter*, 1. Phil. 507; *Anon.* 7 N. J. Law 162; *Matter of Brown*, 2 Col. T. 553; *Ex parte Bradley* 7 Wall. 364; *Ex parte Garland*, 4 Wall. 333; *Ex parte Burr*, ————; *Matter of Blak*, 3 Ellis & Ellis, 33; *In re Sparks*, 17 C. B. N. S. 725; *State v. Strother*, 1 Mo. 605; *State v. Watkins*, 3 Mo. 337; *State v. Foreman*, 3 Mo. 602; *Ohio v. Chapman*, 10 Ohio 430; Paschal An. Dig. Texas, Art. 176; *Jackson v. State*, 21 Tex. 668; 1 Brickle's Dig. (Ala.) 190.

3. Judge Boyle was not disqualified to sit. He was not a member of the association except in a nominal sense. He had no pecuniary interest whatever; was exempt from all dues, could not be called on for costs, had no right to vote, and did not participate in the proceedings of the as-

sociation. Besides the Bar Association was no party to the proceedings, only Martin, Kehr, Lodge, Allen and Clarke individually. The association was not liable for the costs. The prosecutors were alone liable. Again, the supposed disqualification is merely personal, and does not go to the jurisdiction of the court. The writ of prohibition is never awarded to correct such an error.

NAPTON, J.—This application for a writ of prohibition against one of the judges of the circuit court of St. Louis, is based on two grounds, one of which is, that the proceeding against Bowman should have been in the name of the State, and could not be prosecuted by private persons; and the other is, that the judge who presided at the trial of the proceeding was disqualified from sitting by reason of his having been, before his election as judge, a member of the Bar Association, whose committee were the prosecutors, and since his election to the bench, was an honorary member of the same. It is well settled that when the proceedings proposed to be arrested by a prohibition contain such errors as can be reached by an appeal or writ of error, this extraordinary writ will not be allowed, and therefore the first alleged ground of defect of parties is not available. Nor would the fact that the sentence pronounced by the court might be suffered by the party before his appeal could be heard, deprive the appellate court of jurisdiction.

The second ground for the writ is, not any want of jurisdiction on the part of the St. Louis circuit court over the subject-matter, but a personal disqualification of the judge. Waiving all questions in relation to the postponement of this challenge until the close of a protracted trial, and an application to this court after the petitioner's consent to an entry of the judgment, *nunc pro tunc*, at a term succeeding the trial term, we are of opinion that the position of Judge Boyle, as an honorary member of the Bar Association, did not disqualify him from sitting in the

case, since he had not a particle of pecuniary interest involved. The writ of prohibition is denied. Judges SHERWOOD, HOUGH and NORTON concur in this opinion, and Judge HENRY concurs in the result.

HENRY, J.—I concur in the opinion that the writ of prohibition should be denied, because the alleged error may be considered on appeal or writ of error. I express no opinion, nor do I conceive it necessary to the determination of the application, for this court to decide whether Judge Boyle had or had not such an interest in the result of the proceeding to disbar Mr. Bowman, as to disqualify him from presiding at the trial; or whether, or not, that proceeding should have been instituted by the prosecuting attorney, or the Attorney General in the name of the State.

To deny the petitioner the writ of prohibition, because he may appeal, and determine against him the points he would rely upon in the appellate court, is not only refusing him a remedy to which he is not entitled, but prejudging the cause he may present on an appeal or writ of error to which he is entitled. It amounts to a declaration by this court to the court of appeals, that Bowman has no case on the merits while we have virtually declined to consider the merits, by deciding that he is not entitled to a writ of prohibition, because he can have the merits considered on appeal or writ of error.

HOUCK *et al.*, *Appellants* v. CROSS.

1. **Judgment**: EXECUTION: VARIANCE BETWEEN THEM. A judgment contained a clause directing that the debt and damages recovered should be made of the goods and chattels of the debtor. The execution commanded the officer to make the judgment of the goods and chattels, and if sufficient could not be found, then of the lands

and tenements of the debtor. The execution conformed to the law in force at the time. Under it lands were sold and a deed executed by the sheriff. This deed being assailed in ejectment on the ground of variance between the execution and the judgment; *Held*, that there was no real variance; 1st, Because the execution directed the officer to do precisely what was ordered by the judgment, only supplementing the judgment with the additional command to levy on lands and tenements in default of goods and chattels, as the law directed. 2nd, Because the law directed the mode of enforcement, and the direction contained in the judgment was superfluous and, viewed as a judicial decree, was void.

2. **Sheriff's Deed**: HOW IT MAY BE AVOIDED FOR IRREGULARITY IN THE SALE. If a sheriff's sale be made on a day different from that on which it is advertised to be made, the defendant in the execution, or his creditor, if damaged thereby, may by a timely application have the sale set aside; but where the sheriff has made a deed, good upon its face, to the purchaser, who was a stranger to the execution, and there is no evidence in any way connecting him with the mistake made, or tending to show it to have been fraudulent, the deed cannot be collaterally assailed after the lapse of half a century for such irregularity.

Appeal from Cape Girardeau Circuit Court.—HON. D. L. HAWKINS, Judge.

Houck & Ranney for appellants.

The execution must accurately follow the judgment. 1 Robinson's Practice, p. 508; *Bain v. Chrisman*, 27 Mo. 294; *Lillington's Case*, 7 Coke 33, 59; Herman on Ex. p. 42, § 55. The judgment was doubtless merely revived against the goods and chattels, because the heirs and devisees interested in the real estate of Steinbeck were not made parties to the *scire facias*. *Erwin's Lessee v. Dundas*, 4. How. 78. A sale made before the day advertised, is not only a sale without notice, but a sale under circumstances calculated to deter bidders, and *prima facie* would appear to be fraudulent. *Mers v. Bell*, 45 Mo. 345.

Dennis & Wilson for respondent.

The judgment against Byrne, executor, &c., directing

execution to issue against the goods and chattels, &c., was a mere clerical error. It is the policy of the law that the title of purchasers acquired at judicial sales, shall be maintained, and a sale may be valid though the statutory requirements may not be complied with. Herman on Ex., p. 512, § 342. The deed of the sheriff to John Cross conveyed Steinbeck's title. *Stewart v. Severance*, 43 Mo. 322; *Lenox v. Clark*, 52 Mo. 115; *Union Bank v. Mc Wharters*, 52 Mo. 34.

Hough, J.—This was an action of ejectment for a lot in the city of Cape Girardeau, in which judgment was rendered for defendant. Plaintiffs and defendant both claimed under D. F. Steinbeck, as the common source of title. The defendant claimed title under an execution sale of the interest of the common grantor, Steinbeck, in the lot sued for, and on the validity of this sale and the deed made by the sheriff in pursuance thereof, depend the rights of the parties. The circumstances of the sale are as follows: On April 19th, 1822, one Conrad Schultz obtained a judgment in the circuit court of Cape Girardeau county, against D. F. Steinbeck, for the sum of $3,790.91 debt, and $804.92 damages. On the 23rd of December, 1825, Steinbeck having in the meantime died, this judgment was, by *scire facias* revived against his executor. The judgment on *scire facias* concludes as follows: "It is therefore considered by the court that the said judgment be and stand revived against the said Thomas Byrne, executor as aforesaid, and that the said plaintiff have execution against the said Thomas Byrne, executor as aforesaid, for the said sum of three thousand seven hundred and ninety dollars and ninety-one cents for debt, and the sum of eight hundred and four dollars and ninety-two cents for damages, together with legal interest thereon from the nineteenth day of April, A. D. 1822, (the day of the rendition of the judgment aforesaid,) until now, and that he have and recover against defendant his costs and charges ir and about his

scire facias expended, and to be made of the goods and chattels of the said Daniel F. Steinbeck, deceased, remaining in the hands of said Thomas Byrne, executor aforesaid, to be administered, &c." This entry is evidently incomplete as its termination shows, but it must be considered as it appears in the record.

The execution issued upon this judgment was in conformity with the second section of the revised statutes of 1825, in relation to executions, and commanded the officer "that of the goods and chattels of the said Daniel F. Steinbeck, deceased, remaining in the hands of the said Thomas Byrne, executor as aforesaid, to be administered, you cause to be made the aforesaid debt, damages, interest and costs, and if sufficient goods and chattels which were of the said Daniel F. Steinbeck, deceased, cannot be found in your county, then of the lands and tenements which were of the said Daniel F. Steinbeck, deceased, at the time of his death, you cause to be made the debt, damages and costs," &c. Under this execution the lot in question was sold, and the ancestor of the defendant became the purchaser.

It is contended by the plaintiff that there is a fatal variance between the judgment and the execution. It is not denied that the execution was issued upon the judgment above recited, as that is established beyond question by the recitals in the execution, but it is argued that as the judgment only directed the execution to be levied of the goods and chattels of the deceased, the execution departs from the judgment, in requiring a levy to be made on the lands and tenements of the deceased, in default of a sufficient amount of goods and chattels, and is therefore null and void. It is not entirely clear from the phraseology employed, that the words of the judgment, "to be made of the goods and chattels," are applicable to the execution ordered for the debt and damages, or that they apply to anything but the costs on the *scire facias*, but conceding that they do, there is no real

1. JUDGMENT: execution: variance between them.

variance between the judgment and the execution. If the judgment had been entirely silent as to the manner in which the execution should be levied, it is manifest that the execution would be entirely free from objection, as it is in precise conformity with the statute. In so far as the judgment undertakes to prescribe the manner in which the writ shall be executed, it is entirely consistent with the method prescribed by the act on executions. Now the execution directs the officer to do precisely what is ordered by the judgment, but it supplements the judgment, by directing, as the statute provides it shall, that in the event the goods and chattels are insufficient, the officer shall levy on the lands and tenements.

But another view may be taken of this matter. The execution under consideration is, in itself, unexceptionable. It is just such an execution as the law required to be issued. The court, the date, the parties, the amount and the general character of the judgment are all correctly stated. Whatever difficulty exists, arises from the directions contained in the judgment, as to the manner of enforcing the execution. In our opinion, the judgment might with equal propriety, have undertaken to prescribe the time and manner of advertising the sale, the mode of conducting the sale, the form of the return, and the character of the conveyance to be executed by the sheriff. These matters are all prescribed by law, and are not subject to regulation or change by the court, nor within the compass of its jurisdiction. The requirement in question was entirely superfluous, and although not in conflict with the law, as far as it went, it was, viewed as a judicial decree, not simply an error, but unauthorized and void.

2. SHERIFF'S DEED: how it may be avoided for irregularity in the sale.

The objection made to the sheriff's deed is, that it fails to recite the advertisement, and that the copy of the advertisement returned by the sheriff with the execution, shows that the sale was advertised to be made on the 11th day of April, 1827, whereas the deed recites that it was made on the

9th day of April, 1827. No testimony was adduced to explain the discrepancy in dates, and it is doubtful whether any testimony on that subject was attainable after the lapse of half a century from the date of the transaction; and if the discrepancy were even of a more serious character, we should not feel inclined, under the circumstances, to view it with a very critical eye. If the sale was irregular in the particular complained of, the defendant in the execution, if damaged thereby, or his creditors, might by a timely application have had the same set aside. But it is wholly immaterial, so far as the present case is concerned whether the sheriff gave any notice whatever. The deed is good upon its face, the title passed thereby and its validity cannot, for the alleged irregularity, be assailed in this action. *Curd v. Lackland*, 49 Mo. 451. Conceding that there was no mistake in the copy of the advertisement returned by the sheriff, and that the land was sold on the wrong day, the purchaser was a stranger to the execution, and there is no evidence connecting him in any way with the mistake made, or tending to show that the mistake was a fraudulent one. The judgment will be affirmed. All the judges concur.

AFFIRMED.

HAENSCHEN *et al.*, *Appellants v.* THE FRANKLIN INSURANCE COMPANY.

Marine Insurance: PARTICULAR AVERAGE: PARTIAL LOSS. The memorandum clause, in an open policy of insurance on three barge loads of wheat, described the risk as 39,085 bushels, bulk wheat, at $1.15 per bushel—sum $44,945; rate, $1; premium $449 45; to be conveyed from Lansing to St. Louis by steamer and barges. In an action upon the policy, it was held that the wheat was insured in bulk and not in packages, either of one bushel or one barge each; that a clause in the policy, "Each package shall be subject to its

own average," did not apply to such a risk; and that, in determining the percentage of partial loss, the proportion between the entire actual loss and the value of the entire shipment must be ascertained.

Appeal from St. Louis Circuit Court.

The case was tried before Hon. Horatio M. Jones, one of the judges.

Slayback & Haeussler for appellants.

Appellants claim that each bushel of wheat was insured for $1.15, and that they have shown that 2,180 bushels were a total loss, except $109.11, or over 95 per cent., and therefore plaintiffs are entitled to recover as upon a total loss. *Lockwood v. The Sangamo Ins. Co.*, 46 Mo. 71. The wording as to packages or parcels was printed for other goods than bulk wheat, and could not apply. *Delaware Ins. Co. v. Winter*, 38 Penn. St. 187, 176; *Orient Mut. Ins. Co. v. Wright*, 23 How. 401. The written portions of a policy take precedence over the printed portions, because they are construed as a restriction or enlargement of the risks. *Moore v. Perpetual Ins. Co.*, 16 Mo. 98. Where a contract of insurance contains mutual stipulations, such stipulations, if doubtful or ambiguous, are to be construed most favorably to the party entitled to claim its benefits, the insured. *Brown v. Railway P. A. Co.*, 45 Mo. 221; Duer on Insurance, p. 161.

James Taussig for respondent.

The damage and loss was less than twenty per cent. of the 39,085 bushels of bulk wheat insured, and therefore the plaintiffs could not recover. *Jamson v. Ralli*, 36 Eng. Law and Eq. 210; *Wilkinson v. Hyde*, 3 C. B. (n. s.) 47; *Hills v. London Assur. Co.*, 5 Mees. & Wels. 569; *Bivys v. Chesapeake Ins. Co.*, 7 Cranch 415; *Donnell v. Columbia Ins. Co.*, 2 Sumner 367; *Kettell v. Alliance Ins. Co.*, 10 Gray

144; *Hernandez v. Sun Mut. Ins. Co.*, 6 Blatchf. 317; *Newlin v. Ins. Co.*, 20 Penn. St. 315; Arnold on Marine Ins. (4 ed.) 905. The clause in the policy "that each package shall be subject to its own average," has no application to the case at bar, and does not help the appellants. Stevens & Benecke on Ins., p. 439. Even if barge 30 were a package, within the meaning of the policy, appellants not only failed to prove that there was a loss of 20 per cent. by the perils insured against on the contents of that barge, but admitted that the loss was less than 20 per cent. on that barge. Even if said barge were a package, and contained when it left Lansing 17,021 bushels of wheat, appellants failed to prove that there was a loss of 20 per cent. by perils insured against on the contents of that barge. Even if said barge were a package, and contained 17,021 bushels of wheat and of this quantity 3,618 $\frac{45}{60}$ bushels were lost or damaged by the perils insured against, the facts admitted by the appellants still show that the loss was less than 20 per cent., exclusive of charges and expenses incurred for the purpose of ascertaining and proving the loss.

Norton, J.—This suit was instituted in the circuit court of St. Louis county, and is founded on an open policy of insurance of defendant, whereby plaintiffs effected an insurance on a shipment of wheat in 1869 from Lansing, in Iowa, to St. Louis, as evidenced by the following indorsement, "memorandum of risk taken under the annexed policy No. 451. Date ——. Conveyance, Mohawk and barges from Lansing to St. Louis: Property, 39,085 bushels bulk wheat, at $1.15 per bushel—sum, $44,945; rate 1, premium $449.45." The policy also contained the following provisions: 1. "That each package was to be subject to its own average, and, in case of partial loss, the loss should be ascertained by a separation of the contents of the package so damaged. 2. The insurers should not be liable for any partial loss on corn or grain of all kinds,

unless it should amount to twenty (20) per cent. exclusive in all cases of all charges and expenses incurred for the purpose of ascertaining and proving the loss." The facts admitted in the record, and the evidence offered on the trial show that the shipment was made in bulk in three barges, towed by the steamer Mohawk, numbered respectively, 11, 15 and 30, each containing the following number of bushels, viz: barge 11, 6,943$\frac{5}{6}\frac{0}{0}$; barge 15, 16, 558$\frac{4}{6}\frac{5}{0}$; barge 30, 15,582$\frac{5}{6}\frac{0}{0}$; total, 39,085 bushels. It is admitted that barge 30, on its arrival at St. Louis, contained 2,180 bushels of damaged wheat, and 13,402$\frac{5}{6}\frac{0}{0}$ bushels of sound wheat, aggregating 15,582$\frac{5}{6}\frac{0}{0}$ bushels, and also, that barge 30, in its passage down the Mississippi river, collided with a pier of Rock Island bridge, and took in water causing the damage. It is further admitted that plaintiffs, after the arrival of the barge on the 15th of May, presented to defendant a statement claiming that 2,180 bushels of the wheat in barge 30 had been damaged, and that its value was $2,572.40; that the only loss was of the wheat in barge 30, and that, at the time said claim was presented no invoice of the shipment had been received by plaintiffs from the shipper at Lansing, and that no claim for greater loss than 2,180 bushels was made till after the suit was brought, that the shipper at Lansing would testify that barge 30 contained 17,021 bushels when it left Lansing. The damaged wheat was dried and sold, and brought $549.95; plaintiffs claiming that defendants out of that sum were only entitled to be credited with $109.11, which was the net sum realized after paying expenses of drying, selling, &c.; defendants, on the other hand, claiming that the gross amount realized should be credited, because of a clause in the policy declaring "that the partial loss must be 20 per cent. exclusive in all cases of all charges incurred for the purpose of ascertaining the loss." Judgment was rendered for defendant, which, at general term, was affirmed, and from which plaintiffs have appealed.

The contention in the case grows out of the construc-

tion of the following words in the policy: "the insurers shall not be liable for any partial loss on corn or grain of all kinds unless it should amount to 20 per cent. exclusive in all cases of all charges and expenses incurred for the purpose of proving the loss." "That each package was to be subject to its own average, and in case of partial loss, the loss should be ascertained by a separation of the contents of the package so damaged." It is claimed by appellants that under the contract, each bushel of the 39,085 bushels was separately insured as a package, and that, if the 2,180 bushels were damaged 20 per cent. of its value, he is entitled to recover.

It is also claimed that the shipment made in barge 30 is to be considered a package, and that if the wheat in said barge, either in quantity or value, was damaged to the extent of 20 per cent. he was also entitled to recover.

The construction thus sought to be put upon the contract we think is at variance with the authorities to which we have been cited, both English and American. We will notice only two of the latter class of cases, which we think conclusive of the questions presented in the case we are considering.

In case of *Hernandez v. The Sun Mut. Ins. Co.*, 6 Blatch. C. C. R. 317, it was held, in a suit on a policy of marine insurance on six thousand boxes of lemons, that the fact of each box being valued at $4.25 did not make it an insurance on each box. The insurance was on six thousand boxes of lemons, of which 2,179 were lost; held, that under a clause "free of particular average," the company was not liable, because the insurance was construed to be an insurance on the whole six thousand boxes, and not on each box. In *Newlin v. Insurance Campany*, 20 Penn. 312, an insurance was effected in the sum of $5,200, on 104 bales of cotton, valued at $50 per bale. 79 bales being in one lot, marked (13), and 25 in another, marked (18). The cotton was shipped from Savannah to Philadelphia, and on the voyage four bales in the lot marked (18)

were washed overboard, and suit was brought for them at the value of $50 per bale, as mentioned in the policy. It was stipulated in the policy that no loss or average should in any case be paid under five per cent., unless general. It was contended in that case that each bale was separately insured, and also that there being two lots of the cotton, one lot comprising 79 bales, and the other 25, each lot was separately insured. Both these points were ruled against the plaintiff, and Justice Black, in making a disposition of them, observed: "The loss in this case being less than five per cent. of all the cotton insured, the question arises whether the five per cent. is to be calculated on the value of the whole lot or on that of a single bale. It happens every day, that policies mention the price of wheat by the bushel, coffee by the pound, &c., yet it has never been contended that there were insurances on each bushel or pound. * * * In our opinion the indorsement of the cotton was an insurance of the sum total upon the whole bulk, as much as it would have been if no subdivision had been named. In a case like this, the percentage is to be counted on the whole value of the commodity insured, and there can be no recovery for a loss or damage under that proportion, unless it happens by way of general average. This is consistent with the universal practice, according to the reason of the thing, and there is no adjudicated case against it." The principle of these cases applied to the case before us, would exempt the defendant from liability for partial loss, unless such loss amounted to 20 per cent. exclusive of all costs incurred for the purpose of ascertaining the loss. The loss on the 2,180 bushels of damaged wheat, after deducting either the sum of $109.11, which was the net amount realized from it, or the gross sum of $544.95, for which it sold, would not amount in value to 20 per cent. either of the whole number of 39,083 shipped in the three barges, or of the amount insured in barge 30 in which the loss occurred. The only theory upon which plaintiff could recover under the facts agreed

upon, would be that each bushel should be considered as a package. This, we have seen, cannot be maintained, and hence, it follows that the trial court did not err in not adopting it in the instructions it gave, and in instructing that, under the pleadings and evidence, plaintiff could not recover.

It is true that there was evidence tending to show that in barge 30 there was shipped from Lansing 17,021 bushels, if so, it contained nearly 1,500 bushels more of wheat than was insured, and there was no evidence that this over-plus of uninsured wheat was lost by way of the perils insured against. If it had been insured, before it could enter as an element into the calculation for the ascertainment of the percentage of loss, it would have devolved on plaintiffs to show that it was lost by some of the perils insured against. There was a total failure on the part of plaintiffs to do this.

We think that the clause in the policy "that each package shall be subject to its own average," only applies to a shipment of goods and articles in bags, bales, boxes or parcels, and when a valuation and average on such bag, bale, box or parcel is secured by the shipper, and that it has no relation to a shipment of goods in bulk as in this case. Stevens & Ben. on Ins. 439.

Nor do we perceive any such discrepancy as is contended for between the memorandum clause of the policy and the other clause as to justify us in disregarding or rejecting it. After the general description of a risk, such clauses limiting the liability of the insurer, are usually, if not universally, and have since 1794, when they were first introduced, been upheld. 3 Kent Com. 370.

AFFIRMED.

PIER *et al.*, *Appellants* v. HEINRICHSHOFFEN.

1. **Promissory Notes**: DEMAND OF PAYMENT: DILIGENCE: HOLDER NOT PREJUDICED BY MISTAKE OF POSTMASTER. The holder of a note, payable in a distant city, sent it by mail for collection to a bank in that city, in ample time to reach its destination by ordinary course of mail before maturity. When the letter, containing the note, reached the city, the bank had made an assignment, and, the address of the holder being printed on the envelope, the postmaster at once returned it with the endorsement, "bank failed." The holder, on the day of its reception, again mailed it to another agent in said city, who caused it to be presented and protested for non-payment on the day it was received, but several days after maturity; *Held*, that the holder had used due diligence in making demand of payment; that he was not required to make provision for a possible but unanticipated suspension of the bank before arrival of the letter, nor for the unauthorized interference with the same by the public officer in charge of the mails.

2. ——: NOTICE OF NON PAYMENT: NOTARY'S CERTIFICATE: PREPAYMENT OF POSTAGE: MAILS: EVIDENCE. A notary's certificate of protest, which states that he put into the proper postoffice the notice of presentment, demand, refusal and protest, is sufficient without the further statement by him that he prepaid the postage on such notice. So, the word "mailed," as applied to a letter, implies that the letter was properly prepared for transmission, and was put in the custody of the officer charged with the duty of forwarding the mail.

Appeal from St. Louis Circuit Court.

The case was tried before HON. JAMES K. KNIGHT, one of the judges.

Fisher & Rowell and *Botsford & Williams* for appellants.

Appellants were not required to show affirmatively that the postage was prepaid on the notice of protest. *Renshaw v. Triplett*, 23 Mo. 220; 1 Parsons on Notes and Bills, p. 561; *Sanderson v. Judge*, 2 H. Bl. 509; *Parker v. Gordon*, 7 East 385; *Bossard v. Levering*, 6 Wheat. 102. All that is required of the holder of a note in demanding payment thereof, is the use of reasonable diligence. It is

reasonable diligence to send the note for collection in time to reach its destination by ordinary course of mail, and before its maturity; the holder is not obliged to guard against contingencies or look out for them, and is not chargeable with faults of the postoffice department. *Windham Bank v. Norton*, 22 Conn. 213; 2 Parsons on Notes and Bills, pp. 558, 559, 443; Story Prom. Notes, Secs. 336, 337, 338, 340, 368, 259, 209; Story on Bills, Secs. 289, 290, 308, 309, 234.

Slayback & Haeussler for respondents.

The note was not sent to its place of demand and payment until so late that the east miscarriage or delay in the mails carried the arrival of the note there beyond the necessary day. Due diligence requires action early enough to guard against such contingency. *Gilchrist v. Donnell*, 53 Mo. 591; *Napper v. Blank*, 54 Mo. 131; 1 Parsons on Notes and Bills, pp. 355-6, 443, 465; *Schofield v. Bayard*, 3 Wend. 488. The notary, in his certificate, does not state that the letters, containing the alleged notices, were mailed prepaid, so that not even a presumptive case was made out.

Hough, J.—This was an action brought by the plaintiffs, as holders of a negotiable promissory note, against the defendants, as indorsers thereof. The questions presented for determination are, whether the plaintiffs used due diligence in making demand of payment, and gave the requisite notice of non-payment to the defendants. The facts are as follows: The note in question matured on the 4th day of July, 1861, and was payable at the banking house of F. & G. Willins, in the city of St. Paul, Minnesota. Some time in April, 1861, the plaintiffs delivered the same to the bank of Cooperstown, at Cooperstown, New York, for collection. At that time a letter, in due course of mail, would reach St. Paul from Cooperstown, in about six days. The cashier of the bank of Coopers-

town sent the note by mail to its regular correspondent, the Bank of St. Paul, in the city of St. Paul, for collection, in ample time, as the cashier stated, for it to reach its destination by ordinary course of mail, before the maturity of the note. When the letter reaced St. Paul, the Bank of St. Paul had made an assignment, and the envelope having printed on it the words "From the Bank of Cooperstown," the postmaster at once returned it to the Bank of Cooperstown, with the indorsement "bank failed." The letter was received by the Cooperstown Bank in the original envelope, unopened, on the 9th day of July, 1861, and on the same day the note was returned by mail to St. Paul in a letter directed to F. & G. Willins, who caused it to be presented and protested on the 15th day of July, 1861, the day on which it was received.

The defendants contend that there was a want of diligence in not sending the note in time to guard against such contingencies as the evidence dicloses, and that the action of the postmaster in the premises, is no sufficient excuse for the failure to present for payment on the day of the maturity of the note. Professor Parsons, in his treatise on Notes and Bills, says: "Ordinarily any failure to present a note at the proper time, by reason of the negligence of an agent, would discharge an indorser, but where the holder makes use of the public mail for the purpose of transmitting the note to the proper place in season to have a legal demand made, and without any negligence on his part, we should say that he would not lose his remedy on an indorser, if through any accident or disorder, or the negligence or mistake of the postoffice clerks, the note does not reach the destined place in season to make demand on the very day of maturity." Vol. 1, p. 461. In support of his text he cites the case of *Windham Bank v. Norton*, 22 Conn. 213, the leading features of which bear such a striking resemblance to the case at bar, that we think it proper to present them. The draft in that

1. PROMISSORY NOTES: demand of payment; diligence: holder not prejudiced by mistake of postmaster.

case was drawn upon and accepted by Mansfield, Hall & Stone, of Philadelphia, payable at the Farmers' and Mechanics' Bank, in said city, on the 2d day of June, 1849, and was indorsed by the defendants to the plaintiffs in the month of February, 1849. During the same month the bill was indorsed and delivered to the Ohio Life and Trust Co., a banking corporation, in the city of New York, for collection. At that time there were two mails per day from New York to Philadelphia; one leaving at 9 A. M. and one at 4 P. M., both of which were due at Philadelphia five hours after their departure. The Farmers' and Mechanics' Bank was the Philadelphia correspondent of the Ohio Life and Trust Co. On the morning of June 1st, the cashier of the Ohio Life and Trust Co. inclosed this draft with others, properly addressed to the Farmers' and Mechanics' Bank, and deposited said letter in the postoffice at the city of New York, in time for the afternoon mail, of that day for Philadelphia. This mail arrived at Philadelphia in due time, but the mail bags containing the letters for Philadelphia, were by the postoffice clerks in New York, marked to be forwarded to Washington, and were therefore carried to the latter place. The mistake was discovered at Washington, and the mail returned to Philadelphia, reaching there on the 3d of June, and on the next day, June 4th, payment was demanded and refused, protest made and notice given. In discussing the question of negligence, or reasonable diligence, the court said: "The only remaining inquiry is, whether the plaintiffs are chargeable with negligence for not forwarding the draft in question, by an earlier mail from New York to Philadelphia. It was sent by the usual, legal and proper mode. It was deposited in the postoffice in season to reach the place where it was payable, before it fell due, by the regular course of the next mail, and there was no reason to believe that it would not be there duly delivered. It was actually sent by that mail, and, but for the mistake of the postmaster where it was mailed, in misdirecting the pack-

age containing it, would have reached its proper destination, and been received there in season for its presentment when due. It in fact reached that place, when it should have done, but was carried beyond it, in consequence of that mistake. As that mistake could not have been foreseen or apprehended by the plaintiffs, it is not reasonable to require them to take any steps to guard against it. Indeed they could not have done so, as they had no control or supervision over the postmaster. They had a right to presume that the latter had done his duty. They could not know that he had misdirected the package, until it was too late to remedy the consequences. The occurrence of the draft being sent beyond its place of destination, was, therefore, so far as the plaintiffs were concerned, an unavoidable accident."

We have been referred by defendants' counsel to the case of *Schofield v. Bayard*, 3 Wend. 488, as being in direct conflict with the case just cited from Connecticut; but a careful examination of the facts in *Schofield v. Bayard* will show that there is no conflict whatever between the two cases. The latter case contains an element of negligence on the part of the holder, which was absent from the case of *Bank v. Norton*, and which is wanting in the case at bar. The facts were, that a bill drawn by a firm in New York on a house in Liverpool was accepted *supra protest*, by a house in London. The bill was sent by the holder, who resided at Birmingham, to Liverpool for payment, instead of London, where it was payable. The holder's correspondent at Liverpool returned the bill in a letter to the holder, with advice that the presentation should be made in London, and the letter was put in the post office, but by some oversight of the clerks in the post office, it did not get to Birmingham in time for the holder to forward it to London and have a regular demand made. It was held that the drawers were discharged. The court said: "This case presents no impossibility, if due diligence had been used. The plaintiff should not have sent the bill to

Liverpool at all. It is true that after the letter containing it had been left at Liverpool, on the 10th of November, it could not have reached London in season; but it was the fault of the plaintiffs to have parted with the bill in the manner they did. Instead of sending it to Liverpool, they should have sent it to London, and then it would have been in season, and probably would have been paid. I am of the opinion that, by the law merchant payment should have been demanded in London on the 12th of November, and that not having been done, and there being no impossibility to prevent it but what is attributable to the want of due diligence on the part of the holders, the defendants are legally discharged, and are entitled to judgment." It will be seen that the court places its judgment expressly upon the ground that the holder was guilty of negligence in sending the bill to Liverpool, and this fault of his produced the impossibility by virtue of which he claimed to be discharged. In the present case the letter containing the note was not misdirected; it was properly directed; it actually reached St. Paul in time, and but for its unauthorized return by the post master, the probabilities are that some agent or representative of the suspended bank would have received it in time to make due presentment, as the the testimony tends to show that the representatives of the bank continued to receive letters addressed to it, after its suspension. The holders therefore exercised due diligence in sending the note when they did; its arrival in time demonstrates that fact; aud they were not required to make provision in advance for a possible, but unanticipated suspension of the bank of St. Paul before arrival of their letter, or for an unwarrantable interference with the same by the public officer in charge of the mails, after its arrival. We are of the opinion, therefore, that under the circumstances of this case, the demand was seasonably made.

Objections are also made to the notice which was given by the notary. The certificates of protest are as follows:

2. ——: notice of non-payment: notary's certificate: prepayment of postage: mails: evidence,

"Due notices of the foregoing presentment, demand, refusal and protest were put into the post office at St. Paul, as aforesaid, and directed as follows: Notice for Katharina Ambs, directed St. Louis, Mo.: Notice for W. and R. Heinrichshoffen, directed St. Louis, Mo." And the notary testified, "I personally mailed such notices in the postoffice on the 15th day of July, A. D. 1861." The objection is that he did not say that he had prepaid the postage; and the court instructed the jury that this was necessary. This objection is rather hypercritical. The word mailed, as applied to a letter, means that the letter was properly prepared for transmission by the servants of the postal department, and that it was put in the custody of the officer charged with the duty of forwarding the mail. Indeed the words "put into the postoffice," as used by the notary, have a technical significance which is well defined; and they are commonly employed to designate the duty of the holder in giving notice. Since the enactment of the laws requiring all mail matter to be prepaid, these words have been used by this court in the sense of mailed. *Renshaw v. Triplett*, 23 Mo. 220; *Sanderson v. Reinstadler* 31 Mo. 485. In Story on Pomissory Notes, § 328, (Ed. 1859,) it is said, "all that the law requires of the holder is due dilligence to send the notice within the proper time; and he has done his whole duty, when he puts it into the proper postoffice in due season, and it is properly directed. The holder has no control over the acts, or operations, or conduct of the officers of the postoffice, and is not responsible for the accident or neglect which may prevent a due delivery of the notice to the party entitled to notice." It sufficiently appears in the present case that the notice was properly directed. The evident and only meaning of the notary's certificate is that the notice was mailed to the defendants at St. Louis, Mo. The judgment will be reversed and the cause remanded. All concur.

REVERSED.

DONNELL v. HARSHE, *Plaintiff in Error.*

Partnership, WHAT DOES NOT CONSTITUTE. The occupancy and cultivation by one of the farm of another, under an agreement that the crops raised shall be divided between them in a certain proportion, does not necessarily constitute them copartners.

Error to St. Francois Circuit Court.—HON. WILLIAM CARTER, Judge.

This was a suit upon an account for materials used and labor done, in the repair of a house. The answer denied the allegations of the petition, and set up a counter claim. The replication denied all the allegations of the answer in reference to the counter claim, and further alleged that the counter claim and demand of defendant grew out of and was connected with the business of a copartnership, which remained wholly unsettled and unadjusted, and that the copartnership had never been dissolved but was still in full force.

Nalle & Bush for plaintiff in error.

The instruction given by the court in behalf of the plaintiff, is an anomaly in our jurisprudence, without foundation or analogy in the jurisprudence of the other States, or of the mother country. *Campbell v. Dent*, 54 Mo. 325; Collier on Partnership, pp. 3, 23, 25; *Stoallings v. Baker*, 15 Mo. 481.

A partner has a right to withdraw, and thereby dissolve the copartnership, at any time, and at his pleasure. The instruction, in assimilating tenancies to partnerships, would give the parties to a tenancy the same right to withdraw and dissolve the tenancy, as a partner would have.

Carter & Clardy for defendant in error.

The instruction, of which defendant complains, is un-

objectionable. Story on Partnership, p. 4. Sec. 4; *Whitehill v. Shickle*, 43 Mo. 537; *Maclay v. Freeman*, 48 Mo. 234; *McKnight v. McCutchen*, 27 Mo. 436.

NAPTON, J.—The principal and decisive question in this case is the propriety of the following instruction given by the court. "The court instructs the jury that a co-partnership is an agreement between two or more persons of sufficient capacity to contract, to carry on a given business and share the profits of such business; and, if the jury believe from the evidence in this case that there was either a verbal or written agreement between the plaintiff and Emeline Harshe, by which the former was to occupy and cultivate the farm of said Emeline Harshe for any given length of time, and that each was to receive a moiety or share of the crops raised or grown thereon under such agreement, then such farming was a co-partnership business, and belongs to another adjustment, and must be settled or adjusted in a different form of action, and cannot be made available in this action; and, if they find that the matters embraced in defendant's account were connected with or arose out of such business, they will exclude all evidence of such account from their minds," &c. The evidence in the case is not stated in the bill of exceptions, but it is stated that evidence was offered tending to prove that plaintiff and defendant entered into an agreement by which plaintiff was to cultivate a farm of defendant, lying in St. Francois county, on shares; that plaintiff and defendant were each to defray one moiety of the expenses attending such cultivation of said farm, and were to share equally in the profits thereof. The instruction asserts, as a matter of law, that the occupancy and cultivation by one of the farm of another, under an agreement that the owner and occupant will divide the crops raised in an agreed proportion, constitutes the owner and occupant co-partners. This is probably a very common mode of leasing farms in this State, but the proprietor and occu-

pant might be equally surprised to be informed that they were partners.

A definition of partnership, broad enough to embrace all cases and narrow enough to exclude such as ought to be excluded, has been found a very difficult and embarrassing task to those writers who have published books on the subject. The courts have been embarrassed also in nice refinements about partnerships *per sese*, and partnerships which are only as to creditors. Indeed, Judge Story, after a prolonged examination of these distinctions, seems to conclude that the intention of the parties ought to be the controlling circumstance to determine their relations, and, therefore, where the profits and losses are to be shared by the parties in fixed proportions, and, to use his language, "each is intended to be clothed with the powers and rights and duties and responsibilities of a principal, either as to the capital stock or the profits, or both, there may be a just ground to assert, in the absence of all controlling stipulations and circumstances, that they entered a partnership." This, it will be perceived, is quite indefinite.

It is essential to a partnership that there be a community of interest in the subject of it, and this community of interest must not be that of mere joint tenants or tenants in common. When the effect of the agreement is, as propounded in the instruction, that one should occupy and cultivate the farm, and the crops should be divided equally between the occupant and the owner, no partnership is necessarily intended or created. In the case of *Dry v. Boswell*, (1 Camp. 329,) where there was an agreement between the owner of a lighter and a lighterman, that the lighterman should work the lighter, and the gross earnings should be equally divided between him and the owner, Lord Ellenborough held that this was only a mode of paying the lighterman his wages, and was not a participation in profits and loss, and no partnership existed. So in *Ambler v. Bradley*, (6 Vt. 119). A owned a saw mill and

agreed with B that the latter should work it, and divide the gross earnings equally; they were held not to be partners. In *Putnam v. Wise*, (1 Hill's Rep. 234,) an agreement between the owner of a farm and the occupier, that the latter should work it on shares, and a division be made of the gross earnings of the farm, was held not to be a partnership. In *Dwinel v. Stone*, (30 Me. 384,) it was held that a mere participation in profit and loss does not necessarily constitute a partnership. "There must be," said C. J. Shipley, "such a community of interest as empowers each party to make contracts, incur liabilities, manage the whole business and dispose of the whole property, a right which upon the dissolution of the partnership by death of one, passes to the survivor, and not to the representatives of the deceased." In *Caswell v. Districh*, (15 Wend. 379,) the court held an agreement between landlord and tenant, that the tenant should sow certain kinds of grain, and yield a certain portion of each crop to the landlord, made them tenents in common with the crops. In *Denny v, Cabot*, (6 Met. 82,) an agreement was made between H and B, by which H was to supply B with stock to be manufactured into cloth, at his mill, on H's account, and B was to manufacture the stock into cloth and to deliver the cloth to H at a certain sum per yard, and H could pay him one-third part of the net profits of the business, and this was held not to make A and B partners. In *Harrower v. Heath & Cole*, (19 Barb. 331,) an agreement similar to the one to establish which proof was offered in the present case, was held to constitute the owner and occupiers tenants in common, both of the farm and the crops. And in *Johnson v. Hoffman*, (53 Mo. 504,) a similar contract was held to make the landlord and tenants merely tenants in common of the crops and not of the farm. It is useless, however, to multiply authorities on this subject, as hardly any two cases are exactly alike, and very slight shades of distinction lead to different conclusions. The instruction was erroneous, as we think, and the judgment must, therefore,

be reversed. As there appears in the record a long account on each side, it would be greatly more convenient, and probably more likely to produce a just result if a referee could be appointed; but this is a matter which, under our statute, depends on the consent of parties or the discretion of the circuit court. Judgment reversed and case remanded. The other judges concur.

REVERSED.

WILLIAMSON'S CASE.

Criminal Law: CUMULATIVE SENTENCES: STATUTE CONSTRUED. Where a prisoner is convicted on the same day under two distinct indictments, and is separately sentenced under each, to a term of imprisonment in the penitentiary, the terms are not concurrent, but one commences when the other ends, and the prisoner is not entitled to be discharged until both have expired. Wag. Stat., p. 513, § 7, (*following ex parte Turner* 45 *Mo.* 331).

Petition for Habeas Corpus.

Waters & Winslow for petitioner.

J. L. Smith, Attorney General, for the Warden of the Penitentiary.

SHERWOOD, C. J.—The petitioner, in the custody of the Warden of the Penitentiary, has been brought before us by writ of *habeas corpus*. The return to the writ shows that the prisoner was convicted on the same day, under two separate indictments for grand larceny, and separately sentenced under each indictment, to three years imprisonment in the penitentiary. The statute governing cases of this character, is as follows: "When any person shall be convicted of two or more offenses, before sentence shall have been pronounced upon him for either offense, the

imprisonment to which he shall be sentenced upon the second or other subsequent conviction, shall commence at the termination of the term of imprisonment to which he shall be adjudged upon prior conviction." (1 Wag. Stat., p. 513, § 9.)

The statute has been complied with in the present instance; the case of *ex parte Turner*, (45 Mo. 331,) is directly in point, and as only a small portion of the second term of the prisoner has expired, the prisoner will be remanded into the custody of the warden. All concur.

PRISONER REMANDED.

HART, *Plaintiff in Error* v. GILES.

Estoppel against a Claim of Dower. A widow entitled to a dower interest in a city lot, and, although otherwise advised, believing that she had an interest therein, authorized proclamation to be made, at a public sale, for payment of debts by the administrator of her deceased husband, that she did not, and would not, claim dower in the lot, and that it was clear of dower. Relying upon the truth of this public announcement, which was made in the hearing of the widow, the purchaser bid the full value of the lot; *Held*, in a suit by her for admeasurement of dower, that these facts amounted to an estoppel *in pais*, and precluded her recovery.

Error to Marion Circuit Court.—HON. JOHN W. HENRY, Judge.

Lipscomb & Anderson and Jos. L. Hart for plaintiff in error.

James Carr and R. P. Giles for defendant in error, on the subject of estoppel generally, cited 1 Greenlf. Ev. (12th Ed.) § 207, p. 236; *Campbell v. Johnson*, 44 Mo. 247; *Chouteau v. Goddin*, 39 Mo. 229; *Taylor v. Zepp*, 14 Mo. 482; *Newman v. Hook*, 37 Mo. 207; Broom's Leg. Max. (6th

Am. Ed.) pp. 222, 288; 1 Story's Eq. (7th Ed.) §§ 384, 385, p. 372; *Rice v. Bunce*, 49 Mo. 231; *Jones v. Powell*, 6 John. Ch. 194; *Landrum v. The Union Bank*, 63 Mo. 48; *Collins v. Rogers*, 63 Mo. 515; *Evans v. Snyder*, 64 Mo. 516; *Skinner v. Stouse*, 4 Mo. 93; *Lindell v. McLaughlin*, 30 Mo. 28; *Welland Canal Co. v. Hathaway*, 8 Wend. 480; *Willing v. Brown*, 7 S. & R. 467; *Livingston v. Byrne*, 11 Johns. 555; *Huntsucker v. Clark*, 12 Mo. 333; *Rutherford v. Tracy*, 48 Mo. 325; *Lackland v. Stevenson*, 54 Mo. 108; *Moreman v. Talbot*, 55 Mo. 392.

2. A doweress may be estopped from claiming dower if, by her words or conduct, she induces a purchaser to take the estate under a belief that she waives her dower. *Sweany v. Mallory*, 62 Mo. 485; 2 Scribner on Dower, 251, 257; *Dougrey v. Topping*, 4 Paige 94; *Smiley v. Wright*, 2 Hammond (Ohio) 506; *Gatling v. Rodman*, 6 Ind. 289; *Stoney v. Bank of Charleston*, 1 Rich. Eq. (S. C.) 275; *Ellis v. Diddy*, 1 Carter (Ind.) 561; *Wood v. Seely*, 32 N. Y. 105; *Lawrence v. Brown*, 1 Selden (5 N. Y.) 394; *Deshler v. Beerry*, 4 Dall. (Pa.) 300.

3. A person may be estopped, although ignorant of his rights. Simple silence is equally effectual with words or conduct, where one is acquainted with his rights. Hermann on Estoppel, Sec. 416, p. 417; Sec. 417, p. 418; *Storrs v. Barker*, 6 Johns. Ch. 166; *Lyon v. Richmond*, 2 Johns. Ch. 51; *Shotwell v. Murray*, 1 Johns. Ch. 512; *Tilton v. Nelson*, 27 Barb. 595, and cases *supra*.

NORTON, J.—This suit was brought in the Marion county circuit court, in July, 1868, for an admeasurement of dower in lot 4, in block 37, in the city of Palmyra. Plaintiff avers in her petition that she is the widow of Morgan Hart, who, in his lifetime, bought lots 4, 5 and 6 in block 37 in said city, from Reed & Perrin, the owners, on credit, and gave his five several notes for $500 each for the purchase money, the vendors executing to him a bond for conveyance of the title on payment of the purchase

money; that under his purchase he went into possession and afterwards paid three of said notes, and died in possession of the lots. The answer admits the contract of purchase, the payment of $1,500 of the purchase money, which was $2,500, and that Hart died in possession. It avers that Hart's personal estate being insufficient to pay his debts, his administrator, under the statute, procured an order of the county court for the sale of the lot in question, and under said order sold the same on the 1st day of January, 1855, at public sale, to one Richard C. Martin; that plaintiff was present at said sale and authorized the auctioneer to proclaim to the bidders that she did not claim any dower in the property, that she would not claim any dower, and that it was clear of dower; that plaintiff was present and heard such proclamation, and remained silent; that Martin, the purchaser, heard said proclamation and bought the lot at the price of $1,830, which was its full value, and that he would not have paid that price if said statement had not been made by the auctioneer; that plaintiff delivered possession of the lot to Martin immediately after the sale; knew that it was bought by him on the faith of the representations that plaintiff would claim no dower; that plaintiff has ever since lived in the neighborhood of the lot, and did not, from that time to the commencement of the suit, assert any claim to dower, although valuable improvements were made thereon; that Martin afterwards, in 1856, sold his interest in the property to one Williams, who paid off Hart's two notes to Reed & Perrin, and received from them a conveyance to said lot; that Williams was present at the administrator's sale and heard the statements made by the auctioneer; that he afterwards, in 1865, sold and conveyed the lot to defendant, Giles, who had no notice of any claim of dower on the part of plaintiff. The replication of plaintiff denies the matter set up in the answer by way of estoppel, and avers that the statements made by the auctioneer were made on his own responsibility, and on the idea that she had no

dower, because her husband had not paid all the purchase money. The issues presented by the pleadings having been submitted to a jury and being found for defendant, the court rendered judgment accordingly, and plaintiff brings the cause here by writ of error. The evidence offered on the trial clearly establishes that the administrator of Hart, under an order of the county court for the sale of his real estate, to pay debts, offered the lot for sale in the forenoon of the 1st day of January, 1855, and that it was not then sold because no person bid; that it was again offered for sale in the afternoon of the same day, and that previous to any bidding, a proclamation was made by one Hatcher, the son-in-law of plaintiff, and the auctioneer who cried the sale, that Mrs. Hart did not, nor would not claim dower therein, and that the property was clear of dower; that this proclamation was made in the hearing of the bidders, and also of the plaintiff, who was across the street, a distance of 80 feet from the place where the property was being cried off, and that she made no objection; that Martin, who purchased the lot in controversy, heard what was said by the auctioneer, and bid on the strength of it, the full value of the property, and would not have bid otherwise; that plaintiff surrendered the possession soon after the sale and had lived ever since in the immediate vicinity, without asserting any claim to dower, till thirteen years afterwards, when this suit was brought. It is, however, insisted by counsel that the evidence does not show that the statements made by the auctioneer at the time of the sale were authorized by plaintiff, and that even if they were, she is not bound by them because made in ignorance of her rights. On these points the evidence is somewhat conflicting. The auctioneer testifies that he was fully authorized by plaintiff to make the proclamation; that after the failure to sell in the morning, he called upon plaintiff for the purpose of getting her consent to allow the property to be sold without any claim of dower, and that while from lapse of time he could not remember the

exact words used, they gave him full authority to sell it in that way. On the other hand, the plaintiff, while she admitted having had at that time a conversation with Hatcher on the subject of the sale of the lot, denies argumentatively, that she consented that it should be sold free from her claim of dower, as both the administrator and Hatcher had told her she had no dower in it. The evidence of Hatcher, the auctioneer, is strongly corroborated by the fact that plaintiff, whose presence across the street when the auctioneer proclaimed that she would claim no dower, was proven by a disinterested witness, remained silent and interposed no objection; and by the further fact that she surrendered the possession after the sale and acquiesced in it for the period of thirteen years. But it is said that, if the auctioneer was thus authorized, the plaintiff conferred the authority while she was in ignorance of her rights, and was under the belief that she had no dower. We think this position is not borne out by plaintiff's own evidence, for while she swears that Hatcher and the administrator had told her she had no dower, and wished her to consent to the sale, she says: "She had an idea that she had some interest, and was very careful." The evidence strongly tends to show that plaintiff had full knowledge of what had been paid on the property by her husband in his lifetime, what was still to be paid, and of all the circumstances out of which her right of dower might arise; and that, notwithstanding the adverse opinion of others as to her right of dower, she had an opinion of her own that she had some interest in it.

These facts thus in proof, amount to an estoppel *in pais* and to allow plaintiff to claim now what she then yielded, would operate as a fraud upon the party acquiring a right at her solicitation. Actual fraud is not necessary to create an estoppel. The principle is designed for the benefit of one who is misled to his prejudice, and the injury to him is the same, whether his informant deluded him through ignorance, mistake or willful misrepresenta-

tion. Ordinarily, one who makes a representation to another for the purpose of influencing his conduct, assumes that it is true, and it may be questioned whether he can defend on the ground that he acted without knowledge in making it. Such an one would be concluded from denying his own acts or admissions which were expressly designed to influence the conduct of another, and did so influence it, especially when such denial would operate to the injury of the latter. *Tilton v. Nelson*, 27 Barb. 595; *Welland Canal Co. v. Hathaway*, 8 Wend. 480; *Rice v. Bunce*, 49 Mo. 231; *Sweaney v. Mallory*, 62 Mo. 485; *Evans v. Snyder*, 64 Mo. 516; 63 Mo. 48. In *Storrs v. Baker*, 6 John. Chy. 166, it is declared to be the rule in equity that ignorance of one's legal right does not take the case out of the rule, when the circumstances would otherwise create an equitable bar, and that he who encourages another to buy of a third person a right to which he has himself a title is to be postponed in equity to such a purchaser. It is, however, unnecessary to determine in the case before us, what effect, if any, the ignorance of plaintiff as to her right of dower would have, inasmuch, as before indicated, it appeared that plaintiff not only had knowledge of her husband's purchase of the lot in question, but believed she had an interest in it, although she had been otherwise informed, and for that reason, as she herself says, was very careful in what she said in the interview with the auctioneer just before the lot was offered for sale. We think the judgment was for the right party, and it is hereby affirmed, in which the other judges concur.

AFFIRMED.

BLISS *et al.*, *Appellants* v. PRICHARD.

1. **Attorney and Client**: TRUSTS: LACHES. If an attorney at law intrusted with the collection of a debt, is instructed by his client to buy, in his name, land of the debtor offered for sale under execution to satisfy the debt, but instead buys in his own name, without his client's knowledge, the latter will be entitled, upon returning the money received from the sale, to have it set aside and the title vested in himself. But if he becomes aware of the fact that the attorney has bought in his own name, he must assert his right promptly. If he permits eight years to elapse before bringing suit, in a case where, in the meantime the attorney has died, some of the land has been sold to strangers, and all has increased in value from seven to ten fold, he will be held guilty of such laches as will bar his claim.

2. **Laches**: PRACTICE: PLEADING. If it appears by a petition in equity that the plaintiff has been guilty of laches in asserting his claim, the petition will be held bad on demurrer. If additional facts are pleaded with a view of excusing the delay, they must be definitely stated. Thus, it is not sufficient to say that the plaintiff was not aware of the facts upon which he bases his claim to equitable relief until a long time after they occurred. It must appear how long a time elapsed before he became aware of them. (HOUGH, J., dissenting.)

Appeal from Mercer Circuit Court.—HON. G. D. BURGESS, Judge.

C. M. Wright and Hyde & Orton, for appellants.

1. Whether the evidence is regarded as establishing the fact that Prichard purchased the lands in his own name, while instructed to purchase for plaintiff, or as establishing the relation of attorney and client only, between him and the plaintiffs, in either case, the finding should have been for the plaintiffs. Story on Agency, Secs. 189, 207, 211; *Thornton v. Irwin*, 43 Mo. 153; *Grumley v. Webb*, 44 Mo. 444; *Zeigler v. Hughs*, 55 Ill. 302; Story's Eq. Jur. § 311; *Howell v. Ransom*, 11 Paige 538; *Aberdeen R. R. Co. v. Blackie Bros.*, 1 McQueen (House of Lords) 461; *Gardner v. Ogden*, 22 N. Y. 328; *Barnard v. Hunter*, 39 Eng.

Law & Eq. 569; *Casey v. Casey*, 14 Ill. 114; *Jenning v. McConnel*, 17 Ill. 150; *Cowing v. Greene*, 45 Barb. 585.

2. To make silence a ratification, the *onus* is on the defendants to show that not only did the plaintiffs know the facts, but that they had legal advice to explain their rights. Story Eq. Jur., §§ 310, 311; *Casey v. Casey*, 14 Ill. 112; *Jenning v. McConnel*, 17 Ill. 148; *York Building Co. v. McKenzie*, 8 Brown's Cas. in Parl. 42; *Lewin v. Dille*, 17 Mo. 64.

3. The statute of limitation, and equity by analogy to the statute, gave plaintiffs ten years to pursue their remedy after the discovery that Prichard had bought the lands in his own name. *Perry v. Craig*, 3 Mo. 516; *Richardson v. Robinson*, 9 Mo. 810; *Thompson v. Lyon*, 20 Mo. 156; *Davis v. Fox*, 59 Mo. 127; *Michaud v. Girod*, 4 How. 503, 561; *Kelly v. Hurt*, 61 Mo. 466.

A. S. Harris for respondent.

1. The original petition in this case was filed nearly nine years after the purchase by Prichard. As an excuse for this gross laches, it alleges that plaintiffs did not know of his purchase for a long time after it was made. This allegation is too vague and uncertain to be the basis of any action in a court of justice. The petition does not state facts sufficient to constitute a case of action. *Johnson v. Johnson*, 5 Ala. (N. S.) 90, 100; *Bertine v. Varian*, 1 Edw. Chy. 343; *Harwood v. R. R. Co.*, 17 Wall. 78; *McQuiddy v. Ware*, 20 Wall. 19; *Marsh v. Whitmore*, 21 Wall. 185; *Buford v. Brown*, 6 B. Monroe 555; *Williams v. First Pres. Ch.*, 1 Ohio 478; Kerr on Fraud, &c., 365, 367; *Hill v. Miller*, 36 Mo. 194; Hill on Trustees, (3 Am. Ed.) side pp. 525, 168, top pp. 789, 255, in note.

2. The acceptance by the plaintiffs of the proceeds of the sale, with full and distinct notice that their agent and attorney had violated their instructions, was a ratifi-

cation of his act. *Cordova v. Hood*, 17 Wall. 8; Story's Eq., § 400.

3. The plaintiffs have lost all right to relief, if they ever had any by their long acquiescence and gross laches in prosecuting their claim. *Bergen v. Bennett*, 1 Caines Cas. 19; *Sheldon v. Rockwell*, 9 Wis. 164: *McKnight v. Taylor*, 1 How. 168; Kerr on Fraud & Mistake, pp. 303–4–5–6; *Marsh v. Whitmore*, 21 Wall. 185; *Landrum v. Union Bank*, 63 Mo. 56; *Moreman v. Talbott*, 55 Mo. 397; *Mooers v. White*, 6 John. Ch. 360; *Prevost v. Gratz*, 6 Wheat. 498; Story's Eq. § 1520; *Johnson v. Toulmin*, 18 Ala. 50; *Davis v. Fox*, 59 Mo. 127; *Tatum v. Holliday*, 59 Mo. 426; Broderick's Will, 21 Wall. 519.

HENRY, J.—The substance of the allegations in the petition is, that in 1860 Phelps, Bliss & Co., a mercantile firm of the city of New York, placed in the hands of George T. Prichard, an attorney at law, in Mercer county, Missouri, for collection a claim against Cleveland & Winn, a mercantile firm doing business at Princeton, in said county; that in April, 1860, the attorney instituted a suit by attachment on the claim against the members of said firm, and the suit of attachment was levied on the lands in controversy; (a particular description of the lands is not here necessary;) that in July, 1863, there was a final judgment for plaintiffs for $1,020.52, against Cleveland alone, the suit having been dismissed as to Winn; that execution was issued July 18th, 1863, and the lands attached were sold September 14th, 1863, and purchased by said George T. Prichard, to whom the sheriff afterwards executed a deed for the same; that prior to the sale, plaintiffs instructed said Prichard to buy said lands in the name of George Bliss for the benefit of the firm; that neither of said partners at the time resided in Mercer county, or was present at the said sale, or, for a long time thereafter, had any knowledge that Prichard had purchased said land, or any part thereof; that the land did not sell for enough to pay

their debt, costs and attorney's fee, but that they realized only $797.76; that the lands sold were then worth $3,000; that Prichard died in 1864. Plaintiffs offer to return the money received by them from Prichard, and ask that the sale and conveyance of the lands to Prichard be set aside, and the title vested in them, and for an account, &c. The adult defendants, Mary Jane Prichard, the widow of Geo. Prichard, Mary his daughter, and Joel H. Shelley, husband of Ellen Prichard, deceased, demurred to the petition, and the minor defendants, by their guardian *ad litem* answered putting in issue the allegations of the petition. The court overruled the demurrer, and the adult defendants declining to file an answer, there was a trial of the cause, on the issues made by the pleadings between plaintiffs and the minor defendants, at the March term, 1875, of the circuit court of Mercer county, which resulted in a finding for defendants, and a judgment dismissing plaintiffs' bill, from which they have duly prosecuted their apppeal to this court.

The evidence clearly established the following facts: that the demand of Phelps, Bliss & Co., against Cleveland & Winn was received by Prichard, as an attorney, for collection in 1860; that in the spring of 1860, he instituted a suit in attachment against Cleveland & Winn on that demand; that in 1863, he obtained a judgment for $1,020 against Cleveland, having previously dismissed as to Winn; that the lands in question were sold by the sheriff under an execution issued on said judgment, and that Prichard purchased them in his own name, and procured the sheriff's deed for the same; that pending the suit he had been instructed by plaintiffs to purchase said lands in the name of Geo. Bliss for the benefit of the firm, and if this were all of the case. there could be no doubt of plaintiffs' right to the relief they ask; and, to this extent, the authorities cited by their counsel are apposite and conclusive

1. ATTORNEY AND CLIENT: trusts: laches.

Geo. T. Prichard died in October, 1864. This suit

was commenced August 15th, 1872. The evidence shows that in the summer or fall of 1864 plaintiffs were informed by letter, that Prichard had bought the lands. The letter was written by Calvin Butler, in response to one received by him, he says, from Phelps, Bliss & Co., or a law firm in New York representing them. The letter, which he received, he says was a complaining letter, showing that they were dissatisfied. Butler was a lawyer at Princeton, whom Prichard retained to attend to the case against Cleveland & Winn during Prichard's absence in the army in 1862, and who, before and after that judgment was rendered, corresponded with plaintiffs in regard to the business. In 1864, as we have seen, Prichard died, and the lands descended to his wife and children—and a portion of them have been disposed of. The evidence establishes that in 1863, when these lands were sold, there was no demand for real estate; that it was depressed and scarcely had a cash value in Mercer county. One witness testified that he attended the sale with a view of purchasing thirteen acres of the land, but he thought it sold too high and declined to purchase; that the land in 1872 was worth six or seven times as much as its value in 1863. Another witness, an extensive land owner and dealer in real estate, whose land a portion of this adjoined, testified that it sold at the execution sale for more than it was then worth; that in 1872, when this suit was instituted, it was worth ten times its value in 1863. Since the sale in in 1863, a railroad has been completed through Mercer county, which the testimony shows has greatly enhanced the value of these particular lands; that road was completed in 1871. This was substantially the evidence introduced on the trial, and the question is, did it entitle plaintiffs to the relief they asked? Were they not guilty of such laches as to forfeit any right to the relief, which, if they had been diligent, they would have been entitled to?

In *Smith v. Clay*, Ambler 645, Lord Camden said: "A court of equity, which is never active in relief against

conscience, or public convenience, has always refused to aid to stale demands, when the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction there was always a limitation to suits in this court."

In *Badger v. Badger*, 2 Wallace 94, the court held that, "there is a defense peculiar to courts of equity founded on lapse of time, and the staleness of the claim, when no statute of limitations governs the case."

In *Harwood v. Railroad Company*, 17 Wallace 81, the court observed that, "without reference to any statute of limitations, the courts have adopted the principle that the delay which will defeat a recovery must depend upon the particular circumstances of each case."

In *McQuiddy v. Ware*, 20 Wallace 19, the court remarked that, "equity always refuses to interfere where there has been gross laches in the prosecution of rights. There is no artificial rule on such a subject, but each case, as it arises, must be determined by its own particular circumstances."

In *Bergen v. Bennett*, Caines Cases 19, Chancellor Kent said: "What shall be termed a reasonable time, is not susceptible of a definite rule, but must, in a degree, depend upon the circumstances of the particular case, and be guided by sound discretion in the courts."

"Unreasonable delay and mere lapse of time, independently of any statute of limitations, constitute a defense in a court of equity. The doctrine is very ancient and established by a number of authorities." *Sheldon v. Rockwell*, 9 Wis. 166, 181.

"Acquiescence or delay for a length of time after a man is in a situation to enforce a right, and with full knowledge of the facts is, in equity a cogent evidence of a

waiver and abandonment of the right." Kerr on Fraud and Mistake 303.

"Lapse of time, when it does not operate as a positive or statutory bar operates in equity as an evidence of assent, acquiescence or waiver. The two propositions, of bar by length of time, and bar by acquiescence, are not distinct propositions. They constitute but one proposition." Ib. 305.

"A delay, which might have been of no consequence in an ordinary case, may be amply sufficient to bar the title of relief, when the property is of a speculative character, or is subject to contingencies, or where the rights and liabilities of others have been in the meantime varied. If the property is of a speculative or precarious nature, it is the duty of a man complaining of fraud to put forward his complaint at the earliest possible time. He cannot be allowed to remain passive, prepared to affirm the transaction, if the concern should prosper, or to repudiate it if that should prove to his advantage." See, also, *Castner v. Walrod*, 5 Cent. Law Journal 420, decided by the Supreme Court of Illinois, recently.

That the foregoing quotations from adjudged cases and elementary writers announce well established legal propositions, could be sustained by authorities without number; and applying them to the facts of the case under consideration, one is forced to the conclusion that the decree of the circuit court was warranted by the evidence. For nearly eight years after learning that Prichard, in disregard of their instructions, had purchased the property for himself, they slept upon their rights, and seem never to have been aroused to assert them, until a railroad was constructed through the county and along these lands, enhancing their value from seven to tenfold. The road was completed in 1871, and the suit commenced in 1872, and the conviction is forced upon the mind, by the evidence, that, if the lands, instead of advancing, had declined in in value, neither this, nor the circuit court, would have

been called upon to pass upon this case. But it is unnecessary to extend remarks on the subject. A statement of the evidence and the principles of law applicable, are sufficient to dispose of the case, so far as the parties who answered are concerned.

But the adult defendants stood upon their demurrer, and it is now contended, that by the demurrer defendants having admitted the fact, plaintiffs are entitled to a decree against them, if the demurrer was properly overruled. We shall not notice the grounds of the demurrer discussed in the briefs, not because they are not worthy of consideration, but because upon one ground the demurrer was well taken, and it presents a question of less difficulty. This suit was commenced in 1872. The cause of action arose in 1863. Plaintiffs allege that Prichard died in 1864, and that portions of the land in controversy have been sold and conveyed by his heirs to third parties. In their petition, the plaintiffs state, that they had no knowledge that Prichard bought the land until a long time after the sale. They do not say how long a time elapsed after the sale before they became acquainted with that fact. They do not say when they did learn that fact, and omitting so to state, under the circumstances, was a fatal defect in the petition. In the case of *Badger v. Badger*, *supra*, Mr. Justice Grier delivering the opinion of the court, quoted and approved the following authority: "The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill, otherwise the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations."

2. LACHES: practice: pleading.

In *McQuiddy v. Ware*, 20 Wallace 19, the court said:

"These proceedings were begun early in the war, and yet no move is made to disturb them until July, 1871, more than six years after hostilities ceased. Why this delay? The complainant says he was in ignorance of them until recently, and that as soon as he ascertained them he took steps to assert his rights. *Such a general allegation will not suffice to provoke the interposition of a court of equity.*" We italicize that portion of the extract bearing particularly upon the question under consideration.

In *Marsh v. Whitmore*, 21 Wallace 184, the court, Mr. Justice Field, said: "At any rate, the claim now presented is a stale one. The complainant does not set forth specifically any grounds which could have constituted impediments to an earlier prosecution of his suit. He does not even inform us when he first became acquainted with his supposed wrongs. His language is that he was not aware of the purchase by defendant *until lately*—language altogether too vague to invoke the action of a court of equity." He then quotes the language of the court in *Badger v. Badger*, the same above quoted by us, and concludes: "The reasons here stated apply to the present case and justify the decree of the circuit court dismissing the complainant's bill."

In Hill on Trustees 267, the learned author remarks: "However, it has been decided that a bill charging fraud in obtaining an estate cannot be demurred to on the ground of long acquiescence; for the operation of delay, as a bar to the relief, is a conclusion from facts, and is not a matter of law." But, in the note to that paragraph, it is said: "It is now established in the United States, contrary to the doctrine stated in the text, and to some earlier cases, that when it appears on the face of the bill that the statute of limitations, or lapse of time is a bar, the objection may be taken by a demurrer. The complaint, if there be circumstances accounting for the delay, or bringing the case under one of the exceptions of the act, must state them in the first instance, that they may be put in

issue by the answer." And for this doctrine Mr. Bispham cites a number of American authorities.

This is not in conflict with the doctrine of *Kelly v. Hurt* 61 Mo. 466. It was there said that "mere lapse of time, short of the period fixed by the statute of limitations will not bar a claim to equitable relief, where the right is clear, and there are no countervailing circumstances. Here the countervailing circumstances appear in the petition. The statute is imperative, that the time fixed by it shall bar, but it does not affect the rules of equity pleading, which prevailed before it was applied to suits denominated chancery causes before the adoption of the code. It no more affects the rules of equity pleading, as to laches, than it does the doctrine of equity on the subject of laches, and it could as well be maintained that no length of delay, short of the statutory time, will be such laches as will avail a defendant, as that it has changed the rules of equity pleading. The only change effected by the statute is to make it imperative in all cases to allow the statutory bar. Before, the courts of equity, by analogy, allowed it when not inequitable, now they are to allow it without regard to any facts the plaintiff may set up as a reason for his delay.

In *Landrum v. The Bank*, 63 Mo. 56, the court said: "Laches is an equitable defense, and there is no artificial, fixed or determinate rule on this subject, but each case, as it arises, must be decided according to its own particular circumstances."

The facts constituting the laches in that case were alleged in the answer, but we do not regard that decision as an authority against the views here expressed. If the time limited by the statute for the commencement of the action has elapsed, the defendant, if it appear upon the face of the petition, may demur; if not, he may plead the statute. If the statutory time has not elapsed, but the laches appear upon the face of the petition, it may be taken advantage of by demurrer. If plaintiff has been guilty

of laches, but it does not appear in the petition, the defendant, to avail himself of it, must plead it as a defense. It is true, as was observed by Judge Wagner in *Landrum v. The Bank, supra*, that "Laches is an equitable defense," and, if the petition does not disclose laches, the defendant must plead it as a defense; but no good reason can be assigned why, if it appear upon the face of the petition, it may not be taken advantage of by demurrer, as well as when the petition shows that the time prescribed by the statute as a bar has elapsed.

The distinction between law and equity has not been abolished in this State. The modification is as to the form of action, and the change effected is embraced in section 1, page 999, Wag. Stat., which provides that "there shall be in this State but one form of action," &c.

The principles of equity are as deeply imbedded in our law as before the adoption of the code, and he would be regarded as a rash legislator who would propose the entire elimination of equity from our system of jurisprudence. It is so interwoven with the common law, that nothing but confusion and disaster could result from a change so radical. It has not been made, or attempted in this State, and any effort in that direction would be resisted by every one who duly appreciates the salutary and conservative influence of equity upon strict, inflexible law.

In this case the laches appears upon the face of the petition; not mere lapse of time, which, of itself, does not constitute laches, but, also the death of Prichard in 1864 and the alienation of a portion of the lands by some of his heirs to third persons. A delay of nine years in instituting their suit had occurred, and instead of stating when they first came to the knowledge of the fact that their attorney had purchased the lands for himself, plaintiffs contented themselves with the allegation that they had no knowledge of that fact until a long time after the sale. If they had stated when they were first informed that he had

so purchased, and had instituted their suit within a reasonable time thereafter, there would have been no laches disclosed by the petition.

The court should have sustained the demurrer, but, inasmuch as the bill was dismissed as to all the defendants, the judgment is affirmed. All concur except HOUGH, J., who dissents.

AFFIRMED.

HOUGH, J., DISSENTING.—I think the demurrer was properly overruled. It is not pretended that there is any want of equity in the petition. Our present statute of limitations is applicable to all civil actions, whether they are such as were heretofore denominated actions at law, or suits in equity; and when the statute allows ten years in which to bring a suit, and the plaintiff begins it within that time, I do not believe that he is required to state, in his petition, any excuse for not having brought it sooner. If there has been such acquiescence as to bar a recovery, it must be pleaded as a defense.

Even though the demurrer should have been sustained, the judgment of this court is, in my opinion, wrong, as in that event, the plaintiffs would have been entitled to amend, and the case should have been remanded to permit them, if they chose, to make an amendment.

MOORE v. MOORE.

1. **Competency of Non-expert Testimony as to Sanity.** A person who has had an adequate opportunity of observing and judging the mental condition of another, although not an expert, is a competent witness to prove his sanity. The weight to be given to his testimony must depend upon a consideration of all the circumstances under which his opinion was formed.

2. **A Deed of Gift from a Parent to his Child** will not be set aside, on the ground that it makes an unequal distribution of property among his children, when the parent had capacity enough to understand the value of the gift, and the condition and situation of those who had claims upon his bounty.

Error to Miller Circuit Court.—Hon. George W. Miller, Judge.

J. A. Spurlock and James P. Ross for plaintiff in error.

1. Persons who testify that they are well acquainted with a person, his habits, conversations and state of mind, may testify as to his sanity or insanity, though not experts.

2. In the case at bar, a father was making a settlement in favor of his daughter, who was unprovided for, and for his own support, and, of course, for that of his crippled wife; in such a case, fraud, undue influence, &c., must be strictly proved and not presumed. 1 Story Eq., Sec. 694, note A; *Rowland v. Sullivan*, 4 Dessaus. 518.

3. A man has a right to make whatever disposition of his property he chooses, however absurd or unjust, and it will be sustained if capacity, formal execution and volition appear. *Seguine v. Seguine*, 35 How. (N. Y.) 336.

4. Defect of memory, unless it be total, or appertain to things very essential, is not sufficient to create incompetency; nor is old age, however extreme. One has a right by fair persuasion or argument to induce another to make a will in his favor. 4 Clinton, N. Y. Dig., pp. 3455, 3456; *Whitenach v. Striker*, 1 Greene's Ch. 9; 1 Story Eq., Secs. 238, 235; *Watson v. Donnelly*, 28 Barb. 653; 2 Starkie on Ev., pp. 1275-6-7; 2 Phillips on Ev., p. 449.

A. W. Anthony for defendant in error.

The deed worked an injury to the aged wife of the grantor, depriving her of any means of support. It also

works an injury to all the other childen, and ought not to stand. *Turner v. Turner*, 44 Mo. 535; *Cadwallader v. West*, 48 Mo. 483. The burden of proof is on the plaintiff in error. She must furnish the evidence that no fraud or undue influence was used. *Garvin's Admr. v. Williams*, 50 Mo. 206; *Street v. Goss*, 62 Mo. 226.

Norton, J.—Melon Moore, in 1872, executed a deed, the effect of which was to transfer to his daughter, Melinda Moore, all his estate, which consisted of notes, amounting to about $3,000, in the hands of one Harrison. The consideration of this deed, as expressed on its face, was the sum of five dollars, natural love and affection, and that said Melinda should maintain and support him during his life. Said Melinda, after the death of her father, which occurred in 1873, demanded of said Harrison the notes in his possession, and upon his refusal to deliver them, instituted her suit in the Morgan county circuit court, to recover the possession of them. Harrison answered, admitting that he held the notes, but alleged that he had been notified by Simms, the administrator of the estate of Melon Moore not to give the said notes up to the said Melinda Moore, and claimed the notes as assets belonging to the said estate. He further alleged that he had received a similar notice from Stanford Moore, a son of said Melon, and prayed the court for an order making said Simms and the heirs of said Melon Moore parties, and requiring them to interplead and thus settle the conflicting claims. The prayer was granted, and an order made for that purpose, whereupon the said Simms appeared and filed his interplea, claiming said notes, and alleging that Melon Moore, at the time of the execution of said deed, was an old and imbecile man, that confidential relations existed between him and the said Melinda, and that said deed had been procured by fraud, importunity and undue influence of the said Melinda. Stanford Moore also filed a similar answer, except that he did not set up claims to the notes.

The case seems to have been treated by the parties and the trial court as a proceeding in equity to set aside said deed. Issues were framed and submitted to a jury, and, on their finding, a decree was entered canceling the deed, and declaring that the administrator was entitled to the notes, and judgment was accordingly rendered. From this decree and judgment the defendant prosecutes her writ of error.

Without considering the objections made to the action of the court in authorizing the administrator to become a party and file an interplea, and when so made, treating him as party plaintiff and holding the affirmative, we proceed to the consideration of the errors alleged in the rejection of evidence, and that the judgment is not supported by the evidence. In passing on the validity of the deed, two questions were necessarily involved, viz: Did Melon Moore have sufficient mental capacity to make it? If so, was it his act uninfluenced by any abuse of special confidence reposed in the said Melinda, or by fraud or undue influence exerted by her? In support of the affirmative of the proposition in the first question, defendant offered to show by several witnesses, who knew the said Moore, and had often seen and conversed with him, that he was of sound mind, and among others Elizabeth Moore, the daughter of the grantor, who, after stating that she knew the habits and state of mind of her father, and had often heard him speak of business affairs, was asked to state if he talked sensibly or otherwise, and the condition of his mind in 1871 and 1872. This question the court, over the objection of the defendant, refused to allow the witnesses to answer.

Under the ruling of this court in the case of *Baldwin v. The State*, 12 Mo. 223, this evidence ought to have been received and the court erred in rejecting it. Before allowing a witness to testify in regard to the condition of the mind of another, it should appear that he had an adequate opportunity of observing and judging of his capacity

The weight to be given such evidence must depend upon a consideration of all the circumstances under which the opinion was formed, but that such evidence is receivable is established by the above authority. *Baldwin v. State* was followed and approved in the case of *Crowe, Admr. v. Peters*, 63 Mo. 434; and such opinions, when accompanied with some of the facts on which they are based, are allowed to go to the jury. "Was Melon Moore so aged and infirm in body and mind as to be imbecile," was one of the issues submitted to the jury, and the evidence rejected by the court was directly applicable to it.

It is also insisted as error that there was no evidence to sustain the finding of the jury on the following issue submitted, viz: Was the deed procured by fraudulent or undue influence by Melinda Moore? The evidence in the case shows that Melon Moore, at the time the deed was executed, was about eighty years old; that he had nine children; that Melinda was the second one—an old maid—had always lived with her father and mother; that the latter had been a cripple and disabled for some years; that Melinda was their house keeper, and attended faithfully to the wants of both father and mother, till they died in 1873.

The deed in question was executed in 1872, while Melon Moore was living at the house of his daughter, Hannah Chism. Mrs. Russell, Lucinda and Hannah Chism, three daughters of said Melon, all testified in the case, and said that they never heard a word of importunity, or a request on the part of Melinda that the father should make the deed, that he frequently talked about it to them, and told the other children that he intended to give Melinda what he had left, that none of them objected except Stanford; that Melon Moore, on the day the deed was executed, went to Versailles with his daughter, Mrs. Chism, and that the deed was made by him without solicitation from her or Melinda in the office of Spurlock; that on his return he delivered the deed to Melinda. We have failed to per-

ceive from the evidence that Melon Moore reposed any confidence in Melinda more than was common to his other children, or that she had more influence over him than any other of them, or that at any time she exerted such influence, if she possessed it.

It is, however, said that from the face of the instrument, the gain and advantage it secured to Melinda, the age and mental condition of the father, the presumption arises that it was fraudulently obtained by an exercise of undue influence. When confidential relations are shown to exist between grantor and grantee, and the conveyance bears marks of great inequality and great advantage to the grantee and without an adequate consideration, such a presumption might arise, but when the deed is just in itself and its consequences, it will not be avoided on the ground of undue influence. *Turner v. Turner*, 44 Mo. 535; *Cruger v. Douglas*, 4 Edw. Chy. 433, 525, 532; *Whelan v. Whelan*, 3 Cow. 537. It appears from the deed that the grantor was moved to execute from considerations of love and affection, and that he should be taken care of and supported during his life, and from the fact that he had given to his other children as much as Melinda was to get under the deed. This latter statement was attempted to be overthrown by the evidence of Stanford Moore, the only one of the nine children who appeared to contest the validity of the deed. He testified that his father only gave him a suit of clothes and a colt, and he did not think he had given to his other children as much as $2,500 apiece. How much he did give them does not appear, but it does appear that three of the daughters who testified were satisfied, and that the other children were not complaining, and that the administrator stood before the court representing an estate without creditors, the evidence clearly proving that the old man owed nothing at the time of his death. Defendant, however, did offer to show that all the rest of the children were in good circumstances, and well provided for, which the court refused to allow, and on

what principle the refusal was based we are at a loss to perceive, since the plaintiff was permitted to controvert the truth of the statement contained in the deed, that the grantor had given as much to his other children as the grantee would get.

But even if this had appeared and nothing more, if old man Moore had mind and memory enough to comprehend and understand the value of the property, and the condition and situation of those who had claims on his bounty, he had the right to make the deed in question, and it is not sufficient to impeach it, that it is not in all respects as might have been expected. It is not enough to show that a parent has made an unequal distribution of his property. A man has a right to dispose of his property by deed or will as he pleases.

Some incompetency of mind showing an incapacity at the time of executing it, or some imposition practiced on the donor or testator, some confidence abused, or undue influence exerted, should be shown to authorize a court to exercise the power of setting aside wills or deeds properly executed. *Rowland v. Sullivan*, 4 Dessau. Eq. 516.

While the evidence shows that Melon Moore was about eighty years old when he executed the deed, all the witnesses concur in stating that he was physically vigorous for a man of his age, walking erect, going about alone on long trips on horseback. The only facts developed by the evidence, tending to show failure of his mind, are that in going through the woods to the house of a person about one mile distant from where he lived, he got lost or confused and came in at the back door instead of the front; and that, on another occasion, he saw a neighbor in the morning going to town, shook hands with him, and inquired as to his health and the health of his family; and when he returned in the evening, bringing to Moore a pint of alcohol as he had been by him requested to do, Moore again shook hands with him, and inquired again as to his health.

Neither one or both of these circumstances would be sufficient to invalidate a deed, which we are not prepared to say, from the standpoint furnished us by the evidence, is unjust in its provisions. If the deed is to be viewed as made upon the consideration of past services rendered, and future services to be rendered, the evidence shows that they were faithfully performed, for according to it, the mother had been a cripple for some years, and Melinda, according to the evidence of the three sisters, waited upon the father and mother day and night till they died.

If it is to be regarded as made on the consideration of love and affection, when it is considered that Melon Moore esteemed that all his other children had been provided for, and that they did not in fact, as defendant offered to prove, need his bounty, and that his daughter Melinda had devoted her life to him, and was unprovided for, the provision made for her in the deed would seem not only wise but just.

The judgment will be reversed and cause remanded, to be disposed of according to the views herein expressed, in which the other judges concur.

REVERSED.

STATE *ex rel.*, HAEUSSLER v. COURT OF APPEALS.

Supreme Court: JURISDICTION: APPEAL FROM ST. LOUIS COURT OF APPEALS, WHEN IT WILL NOT LIE. A suit to enjoin a sale of real estate under execution, upon the ground that such sale would cast a cloud upon the title, is not a case involving the title to real estate within the meaning of that clause of section 12, article 6, of the constitution of 1875, which declares that appeals shall lie from the decisions of the St. Louis Court of Appeals to the Supreme Court in all such cases.

Mandamus to the Judges of the St. Louis Court of Appeals.

Edwin Silver and H. Haeussler for relator.

The title to real estate is involved. The question is analogous to that presented by a bill in equity to remove a cloud on title to real property. *Clark v. Cov. Mut. Ins. Co.*, 52 Mo. 272; *Sullivan v. Finnegan*, 101 Mass. 447; *Clouston v. Shearer*, 99 Mass. 209; *Pettit v. Sheperd*, 5 Paige 493; *Christie v. Hale*, 46 Ill. 117.

W. B. Thompson for respondent.

Hough, J.—On the 23rd day of March, 1876, the relator filed a petition in the circuit court of St. Louis county, to enjoin a sale under execution of certain real estate in St. Louis, upon the ground that such sale would cast a cloud upon his title. A perpetual injunction was decreed by the circuit court, and on appeal to the Court of Appeals the judgment of the circuit court was reversed, and the cause remanded. Thereupon the relator applied for an appeal to this court, and the Court of Appeals refused to allow the same. The relator now asks that a writ of mandamus be issued by this court compelling the Court of Appeals to grant him an appeal. His application is founded upon that provision of the constitution, which declares that appeals shall lie from the decisions of the Court of Appeals to this court, in all cases involving the title to real estate. The suit for injunction prosecuted by the relator is not one involving the title to real estate, within the meaning of the constitution. The result of the litigation may *affect* the title to real property, as would every suit in which a judgment could be rendered which would be a lien on real estate, but it cannot be said to *involve* the title.

At the January term, 1876, at St. Louis, we decided that suits on special tax bills, and to foreclose mortgages, and to enforce mechanics liens, were not suits involving

title to real estate, and all such cases involving sums within the final jurisdiction of the Court of Appeals which were docketed in this court after the establishment of that court, were transferred to it. The real matters which the relator seeks to have determined in the suit for injunction, are the validity and effect of the proceedings under which the execution sale is threatened to be made. He has, as yet, no contest with any one about the title to his property. The writ will be denied. All concur.

WRIT DENIED.

DURRETT v. HULSE *et al.*, *Appellants.*

Judgment, LIEN OF, CONTINUED BY EXECUTION. The issue and levy of an execution upon real estate, during the existence of the lien of the judgment, continues such lien until the writ can be duly executed; and a sale thereunder confers a better title than that under a deed of trust given after the inception of the judgment lien, but prior to the issue and levy of the execution, (*following Bank v. Wells*, 12 *Mo.* 361).

Appeal from Ralls Circuit Court.—HON. JOHN T. REDD, Judge.

Waters & Winslow for appellants.

The judgment was in existence at the passage of the stay law of 1861, (Laws 1860–61, p. 28, Sec. 1). This law, so far as the existing judgment was concerned, was unconstitutional. *Gentry v. Baily*, 1 Mo. 164; *Brown v. Ward*, 1 Mo. 209; *Bumgardner v. Circuit Court*, 4 Mo. 50; *Stevens v. Andrews*, 31 Mo. 205; *Bruns v. Crawford*, 34 Mo. 330; *Donnell v. Stephens*, 35 Mo. 441; *Lapsley v. Brashears*, 4 Litt. (Ky.) 47; *Grayson v. Lilly*, 7 Monr. (Ky.) 10; *Stephenson v. Basnett*, 7 Monr. (Ky.) 50; *Townsend v. Townsend*, 1 Peck. (Tenn.) 131; *Dormire v. Cogley*, 8 Blackf. (Ind.)

177; *Strong v. Daniel*, 5 Ind. 348; *McCracken v. Hayward*, 2 How. 608.

The law will not be declared valid and effectual to suspend the execution in a case where a judgment lien would be lost by the delay. Aside from this, the judgment creditor had ample time after the passage of the stay law to have issued his execution under its provisions, and sold the land during the existence of his lien. On the 26th day of August, 1862, the lien of the judgment expired by limitation, and the lien of the deed of trust immediately attached as the prior lien upon the land. The rights or lien of the judgment creditor under his levy instantly became junior to the deed of trust, and the levy of the execution during the existence of the lien of the judgment did not continue that lien one instant against the deed of trust. *Trapnall v. Richardson*, 13 Eng. (Ark.) 543; *Isaac v. Swift*, 10 Cal. 71; *Bagley v. Ward*, 37 Cal. 121; *Rogers v. Druffel*, 46 Cal. 654; *Little v. Harvey*, 9 Wend. 158; *Tufts v. Tufts*, 18 Wend. 621; *Davis v. Ehrman*, 20 Pa. St. 258; *Terry v. Hemenway*, 53 Ill. 98; *Gridley v. Watson*, 53 Ill. 186; *Conwell v. Watkins*, 71 Ill. 448; *Thompson v. Phillips*, 1 Baldwin's C. C. 246; *Tucker v. Shade*, 25 Ohio St. 355.

Dryden & Dryden with *H. S. Lipscomb*.

The statute (Sess. Acts 1861, p. 28,) operated to continue the lien of the levy of July to the time of the sale. Besides the levy continued the lien of the judgment, and its priority until the writ was executed. *Bank v. Wells*, 12 Mo. 361; *Bruce v. Vogel*, 38 Mo. 100; *Wood v. Messerly*, 46 Mo. 255; *Union Bank v. Manard*, 51 Mo. 548. It was proper for the clerks and sheriff to obey the directions of the act of 1861, whether constitutional or not, and plaintiff should not suffer from that obedience. It was no fault of the sheriff that the sale was not sooner made. Sec. 54, p. 748; 1 Rev. Stat. of 1855, continued in 1 Wag. Stat.,

p. 611, § 51, preserved the lien of the judgment until sale under the writ.

SHERWOOD, C. J.—Ejectment. The judgment under which plaintiff claims, was rendered August 26, 1859, execution issued April 20th, 1862, returnable March, 1863, and levied July 2, 1862, sale occurred March 25, 1863, and deed executed April 1, of that year. The defendant claims under a deed of trust, executed February 23, 1861, and sale thereunder June 11th, 1863. The court below held that plaintiff had acquired the title, and so do we. (*Bank v. Wells*, 12 Mo. 361; *Wood v. Messerly*, 46 Mo. 255.) Judgment affirmed. All concur.

AFFIRMED.

OVERALL v. RUENZI *et al.*, *Appellants.*

1. **Injunction against Illegal Taxation.** Injunction is a proper remedy to prevent the collection of a tax levied in excess of the legal limit; but before the writ is granted the court should require the complainant to pay so much of the tax as is confessedly due.
2. **Taxation**: CONSTITUTION OF 1875. A city tax was assessed prior to November 30th, 1875, the day when the new constitution took effect, but the assessment was not finally passed on by the Board of Appeals until April, 1876, and the bills were not received by the collector until July, 1876; *Held*, that it was subject to the restrictions of section 11, article 10 of the constitution, limiting the rate of taxation for city purposes, and requiring the valuation to be the same as for State and county purposes.

Appeal from Audrain Circuit Court.—HON. GILCHRIST PORTER, Judge.

This suit was brought by plaintiffs as tax-payers of the city of St. Charles, in behalf of themselves and all other citizens of said city similarly situated, to restrain said city and its collector of taxes from collecting so much of the

tax assessed for general purposes, as was in excess of the limit prescribed by the constitution of 1875. The taxes were such as the city, by its charter, approved March 1st, 1869, and by its ordinances under such charter was empowered to levy and collect; but it was claimed by the plaintiffs that the rate of taxation was cut down and controlled by the constitution of the State, which took effect on the 30th day of November, 1875, and that the valuation of the property was in excess of the valuation of the same property for State and county purposes, and, for that reason, in violation of the constitution.

Theodore T. McDearmon & Theodore Bruere for appellants.

The weight of opinion in other States is that a court of equity has no jurisdiction to prevent by injunction the collection of an illegal or unconstitutional tax. *Messech v. Board, &c.*, 50 Barb, 190; *Minturn v. Hays*, 2 Cal. 590; *Wilson v. Mayor, &c.*, 4 E. D. Smith 675; *McCoy v. Chillicothe*, 3 Ham. (O.) 380; *Fremont v. Boling*, 11 Cal. 361, 380; *Van Rensselaer v. Kidd*, 4 Barb. 17; *Greene v. Mumford*, 4 R. I. 313; *Williams v. Detroit*, 2 Mich. 560; *Mechanics, &c. v. Debolt*, 1 Ohio 591; *Brewer v. Springfield*, 97 Mass. 154.

2. The decisions of this State uniformly deny the right to enjoin the collection of a tax however illegal or void the same may be. *Sayre v. Tompkins*, 23 Mo. 443; *Barrow v. Davis*, 46 Mo. 394; *Hopkins v. Lovell*, 47 Mo. 102; *Anderson v. City of St. Louis*, 47 Mo. 479; *McPike v. Pew*, 48 Mo. 525; *Steines v. Franklin County*, 48 Mo. 167; *The State v. Saline County Court*, 51 Mo. 350.

3. It is not denied that in this State, equity will interfere by injunction to prevent the sale of real estate for the collection of an illegal tax, upon the ground that such sale would cast a cloud upon the title. But there is a marked difference between such a case and the present where it does not appear that real estate has in any manner

been interfered with, and where the collector had no authority to interfere with real estate. His authority to enforce the payment of the tax was confined to the seizure and sale of personal property. Injunction will not lie to prevent the sale of personal property. *Deane v. Todd*, 22 Mo. 91; *Lockwood v. City of St. Louis*, 24 Mo. 20.

4. The liability of the tax-payer was fixed at the date of the completion of the tax-book by the city assessor Cooley on Taxation, pp. 258, 259, 260 and 270, and note. *State v. Hardin*, 34 N. J. 79; *Harmon v. New Marborough*, 9 Cush. 525; *People v. Supervisors of Chenango*, 11 N. Y. 563; *Ware v. First Parish*, 8 Cush. 267; *Woodward v. French*, 31 Vt. 337; *Walker v. Miner*, 32 Id. 769; *Ovitt v. Chase*, 37 Id. 196; *Field v. Boston*, 10 Cush. 65; *Dow v. First Parish*, 5 Met. 73; *Mitchell v. Leavenworth County*, 9 Kansas, 344; *Wells v. Smyth*, 55 Penn. St. 159, 162; *Blossom v. Van Court*, 34 Mo. 390.

5. It is a well settled principle of equity in these cases that the amount of tax admitted to be due should be tendered and offered to be paid, and this without conditions; otherwise equity will not interfere. State Railroad Tax Cases, 92 U. S. 575.

H. C. Lackland, for respondents.

1. The tax of more than fifty cents on $100 is unconstitutional. The levy made is one dollar per $100, for general purposes, which is 50 cts. per $100 too much. Constitution Mo., Art. 10, § 11; *St. Jo. Public Schools v. Patten*, 62 Mo. 444; *Ketchum v. P. R. R. Co.*, 3 Central Law Journal, p. 725. The constitutional limitation as to rates of taxation took immediate effect and was intended to apply to all taxes collected after the constitution went into effect. This is the case, even though the assessment had been made and completed before the constitution took effect, (Nov. 30, 1875). The time of the assessment is of no importance. The question is, when were the taxes collectible?

If they were not collectable until after the new constitution went into force, then only the rates prescribed by that instrument can be collected. *Southern Hotel Co. v. County Court*, 62 Mo. 134; *Valle v. Fargo*, 1 Mo. Appeal R. 344.

2. Injunction will lie, without regard to the question whether the collection of the taxes can be enforced by the seizure and sale of real or personal property. When officers or individuals, have no legal authority to lay a tax, and they assume the right, or when persons are vested with legal authority to lay a tax for a specified purpose, but instead of exercising that power, they proceed to impose a tax which the law has not authorized, or lay it for fraudulent or unauthorized purposes, then a court of equity will interpose to afford preventive relief by restraining the exercise of powers perverted to fraudulent or oppressive purposes. *Drake v. Philips*, 40 Ill. 388; *Foote v. Milwaukee*, 18 Wis. 270; *Toledo, &c., R. R. Co. v. Lafayette*, 22 Ind. 262; *Comrs. Clay County v. Markle*, 46 Ind. 96; *Knight v. Flatrock*, 45 Ind. 134; *Riley v. Western Un. Tel. Co.*, 47 Ind. 511; *Shoemaker v. Grant Co.*, 36 Ind. 175, *Spencer v. Wheaton*, (personal property) 14 Iowa 38; St Clair B'd Appeals, 74 Penn. St. 252; *Williams v. Pinny*, 25 Iowa 413; Dissenting opinion of Judge Scott in *Deane v. Todd*, 22 Mo. Reps. 90 and 93; *Allen v. Jay*, 60 Me. 124; *Bristol v. Johnson*, 34 Mich. 123; *Mount Vernon v. Hovey*, 52 Ind. 563; *Merrill v. Humphreys*, 24 Mich. 170; *Mitchell v. Leavenworth County*, 9 Kans. 344; *The Home Ins. Co. v. Augusta*, 50 Ga. 530; *Chicago, B. & Q. R. R. Co. v. Cole*, 75 Ill. 591; also *Same v. Paddock*, 75 Ill. 616; *Town of Lebanon v. O. & M. R. R. Co.*, 77 Ill. 539; *First National Bank v. Cook*, 77 Ill. 622; *Nunda v. Crystal Lake*, 79. Ill. 314; *Gould v. Mayor, &c. of Atlanta*, 55 Ga. 678; *Matthis v. Town of Cameron*, 62 Mo. 504; *State v. Saline Co. Court*, 51 Mo. 350; *Newmeyer v. M. & M. R. R. Co.*, 52 Mo. 81.

NAPTON, J.—There are but two points in this case, each

of which has been very elaborately and ably discussed by the counsel on either side.

In regard to the propriety of an injunction on the facts stated, various authorities cited on either side have been examined, but we deem it necessary only to state the conclusions we have reached without any review of the cases. It would be difficult, if not impossible, to reconcile the authorities, either here or elsewhere. But it is quite apparent that of late years, whether by reason of our statute in regard to injunctions, first introduced into the Revised Code of 1865, or upon general grounds of expediency, this court has been disposed to regard with favor proceedings which are preventive in their character, rather than compel the injured party to seek redress after the damage is accomplished. We see no objection, therefore, to the mode adopted in this case to test the validity of the tax.

1. INJUNCTION AGAINST ILLEGAL TAXATION.

The question as to the validity of the levy of a tax prohibited by the constitution of 1875, when the assessment had been made prior to the 30th of November, when the constitution went into operation, was examined by this court in the cases of *St. Joseph Pub. Schools v. Patten* 62 Mo. 444, and *Southern Hotel Co. v. County Court of St. Louis*, 62 Mo. 134, and by the Court of Appeals in *Valle v. Fargo*, Vol. 1, p. 344, and by the U. S. District Judge in *Ketchum v. Pac. R. R. Co.*, reported in Central Law Journal November 10th, 1876, p. 725. The tax in that case was for the year 1876. Although the assessment was made on the 29th of November, 1875, the day before the constitution went into operation, it was not finally passed upon by the board of appeals until the latter part of April, 1876, and was not received by the collector till sometime in July of that year. It was therefore subject to the restrictions of the constitution of 1875.

2. TAXATION: constitution of 1875.

We are, however, of opinion that the court should have required the payment of the taxes confessedly due, before granting the injunction, and the case will be remanded in

order that the court may name a day within which the plaintiffs may pay into court this sum, before granting any injunction. Judgment reversed and cause remanded. The other judges concur.

REVERSED.

DAVISON v. ROBERTSON, *Appellant.*

Conflicting Execution Titles: EQUITY FOR REIMBURSEMENT OF PURCHASE MONEY AND TAXES: MISTAKE. A tract of land which had been conveyed by an erroneous description was levied upon successively by two judgment creditors of the purchaser, and each bought at his own sale. The levy of the first creditor was made after his execution had expired, and the sheriff's deed therefore conveyed no title. He, however, took possession, and for several years paid the taxes. Afterwards, to protect himself against the other creditor, whose proceedings had been regular, he procured from the heirs of the original owner a deed conveying the land by a correct description. In an equitable proceeding to settle the title; *Held*, that the second creditor was entitled to a decree vesting in himself the title so acquired by the other, and this without making compensation for the cost of acquiring it or the taxes he had paid.

Appeal from Andrew Circuit Court—HON. HENRY S. KELLEY, Judge.

This is a suit to divest the defendant of all title to the n e qr., n w qr. Sec. 15, T. 61, R. 36, in Andrew county, and to have the same vested in plaintiff, and for general relief. It appeared that prior to 1860 this tract of land was owned by one Jacob Bird, who having died intestate, leaving several children, one of them, Eli, bought out the interests of all the others, but by mistake their deed to him described the land as lying in section 14 instead of section 15. On the 9th day of January, 1860, Eli conveyed the land by the same mistaken description, to one Gabriel Long, who took possession of the land in section

15, and exercised acts of ownership over it for some time. On the 15th day of December, 1870, the plaintiff, Davison, commenced a suit by attachment against Long, and caused the writ to be levied on this land. It was subsequently sold under an execution issued upon a judgment rendered in this case, and plaintiff became the purchaser, and received a sheriff's deed in June, 1872.

It appeared, also, that in 1861 defendant, Robertson, and one Laughlin, obtained several judgments against Long, and on the 5th day of September, 1863, executions were issued thereon, returnable on the 5th day of October, 1863. These executions were levied on the land in controversy in March, 1864, and the defendant became the purchaser at a sale under them in April, 1864, and received from the sheriff a deed, describing the land correctly, and went into possession and paid the taxes for several years. In 1872, with full knowledge of plaintiff's attachment proceedings against Long, defendant procured from the heirs of Jacob Bird a quit claim deed to the land in controversy. On the 13th day of December, 1860, Long executed a mortgage in favor of Hail & Knott, upon land described as the s e qr., n w qr., Sec. 14, T. 61, R. 36. In May, 1873, defendant procured from Hail & Knott an assignment of this mortgage and the debt secured by it. Upon these facts the court rendered a decree divesting the legal title out of defendant, and vesting it in plaintiff, and reforming the deeds from the heirs of Jacob Bird to Eli Bird, and from Eli Bird to Long, so as to make them convey the land in section 15, instead of section 14. Defendant appealed.

William Heren for appellant.

1. Appellant laid out his money in the purchase of the land, paid the taxes, and took possession, believing that he had a good title, long prior to the assertion of any claim by the respondent. Whether he had the better

legal title or not, he had the prior and better equity, and being in possession of the land in good faith, he had the legal and equitable right to procure the legal title, in order to protect himself in the possession. *Bassett v. Nosworthey*, Lead. Cas. in Equity, Vol. 2. pt. 1, p. 33. 2. The deeds from the heirs of Jacob Bird to Eli Bird, and from Eli Bird to Long, could not be corrected and reformed in this suit, a collateral proceeding. That must be done in a direct suit with the proper parties before the court.

Bennett Pike, *W. S. Greenlee* and *W. W. Caldwell* for respondent.

1. The sheriff's deed to appellant was void. No levy of the execution was made until five months after the writ had become *functus officio*. *Bank of Mo. v. Bray*, 37 Mo. 194; Acts of 1863, p. 20. 2. The heirs of Jacob and Eli Bird were not necessary parties to this suit. Long after respondent's attachment of the land, the appellant procured from these heirs a quit claim deed, conveying to him all their right and title in and to the land; hence they had no interest in the suit whatever. 3. The appellant did not attempt to prove by any one that Long intended to convey the land in dispute by the mortgage, under the assignment of which he claims some right or title in the land.

NAPTON, J.—This case presents difficulties growing out of a somewhat novel and peculiar state of facts. The defendant went into possession of the land in dispute, in 1864, under a sheriff's deed, based on a valid judgment, but of no validity itself, because of the levy of the execution having been made after the return day of the writ. There could be no difficulty in applying to this case the principles decided in *Howard v. North*, (5 Texas 315,) following various decisions in Kentucky, Louisiana and South Carolina, and followed by this court in *Valle v. Fleming*, (29 Mo. 152,) and *McLean v. Martin*, (45 Mo. 393,) if the

debtor, Gabriel Long, had been the party plaintiff. But the plaintiff is a creditor of Long, and in 1870 commenced his attachment suit against this land, and perfected it by a sheriff's deed in June, 1872. In 1871 the defendant procured a quit claim deed from the heirs of Jacob Bird, in whom the legal title was all along vested. This was done with a view to protect his possession, acquired under his purchase in 1864, and he had a right to do this. (Freeman's Ch. R. 123.) Strange to say, the plaintiff adopts this sale and conveyance to save him from the trouble of making the heirs of Bird parties in this suit for a transfer of their legal title; as he says, the defendant has already acquired it, and he insists on a transfer of this legal title of defendant to him, without any compensation for the money defendant paid on his purchase, or the taxes he paid for nearly ten years. That Long could not do this is clear. The question is, does his creditor in 1870 occupy a better position? Is he entitled to do what Long, the debtor, would not be allowed to do? I am not satisfied to answer this question in the affirmative; but as all the other judges concur that this equity of the defendant does not reach Long's creditor, this judgment must be affirmed.

The purchase of the mortgage of Long to Hail & Knott in December, 1861, by defendant in 1873, cannot avail the defendant in this suit, because he failed to prove that Long intended to convey the tract in controversy, and for aught that appeared, Long may have owned a quarter quarter section in section 14, as described in the conveyance. It was proved by the plaintiff that Bird did not, but it did not follow from this proof that Long may not have owned such land. Judgment affirmed.

AFFIRMED.

FERGUSON v. BARTHOLOMEW, *et al. Plaintiffs in Error.*

1. **Military Bounty Lands:** RECORDED DEED: NOTICE. A conveyance of military bounty land which, without being either acknowledged or proven, was recorded in the county where the land lay prior to the passage of the act of February 2d, 1847, entitled "An act to quiet vexatious land litigation," (Sess. Acts, p. 94) is within the operation of section 8 of that act, (re-enacted as § 35, Chap. 143, Gen. Stats. 1865) and from and after that date imparted notice to all persons of its contents. (*Crispen v. Hannavan, 50 Mo. 416, limited and explained.*)

2. **Adverse Possession:** HOSTILE ENTRY: STATUTE OF LIMITATIONS. When possession of land has been restored by legal process to one who had been deprived of it by an adverse claimant, the entry of the latter will not, in a subsequent action of ejectment, be allowed the effect of destroying the continuity of possession or of interrupting the running of the statute of limitations in favor of the former, if it was made with force and strong hand, nor unless suit was commenced upon it within one year after it was made, and within the time limited for bringing an action of ejectment.

Error to Chariton Circuit Court—HON. G. D. BURGESS, Judge.

Waters & Winslow for plaintiffs in error.

1. The entries of Ferguson and his tenants, although made under the paramount title, stand on the same ground as though made by naked trespassers. *Spalding v. Mayhall*, 27 Mo. 377; *Harris v. Turner*, 46 Mo. 438; *Robinson v. Walker*, 50 Mo. 19; *Dilworth v. Fee*, 52 Mo. 130.

2. The right of entry, upon lands held adversely, either as an extra judicial remedy to regain the possession, or as a means of arresting the statute of limitations, never obtained a foothold in this State. The early history of the Louisiana Territory, and the subsequent course of legislation and adjudication in the Missouri Territory and the State of Missouri, afford no countenance to the idea that the common law doctrine of entry came in with the act of January 19th, 1816, (1 Terr. Laws, p. 436,) adopting certain portions of the common law and the British Statutes, or with the subsequent limitation act of December 17th,

1818. (1 Terr. Laws, p. 598, § 1). The effect of the statute of forcible entry and detainer, passed August 19th, 1813, (1 Terr. Laws, p. 268,) was, alone, sufficient to prevent the introduction of common law entries either by the act of 1816 or 1818. *Emerson v. Sturgeon*, 59 Mo. 404; *Lecompte v. Wash*, 9 Mo. 547; *Cathcart v. Walter*, 14 Mo. 17; *Dennison v. Smith*, 26 Mo. 487; *Wunsch v. Gretel*, 26 Mo. 580.

3. Ferguson's last entry was made March, 1870, and his first action of ejectment was commenced September 1st, 1871. His entry, therefore, was of no avail, suit not having been commenced within the year.

4. Ferguson's entries, having been forcible, did not have the slightest effect upon the adverse possession o plaintiffs in error. They were promptly met by proceedings in forcible entry and detainer, under which possession was twice restored to plaintiffs in error; and the effect of these proceedings was to restore them to the possession, which, by relation, or the operation of a kind of *jus postliminii* under the statute, so to speak, revested in them as though they had never been driven out by the hostile force. These proceedings were acts of possession performed with reference to the land. *Benest v. Pipon*, 1 Knapp 70; 1 Domat's Civil Law, 889, Sec. 2234; *Smith v. Lorillard*, 10 Johns. 338, 351; *Hamilton v. Boggess*, 63 Mo. 247; 3 Blackst. Comm., p. 210; 4 Kent's Comm., p. 119; Waterman on Trespasses 873, § 931; 9 Bac. Abr. Tit. Trespass, C.; *Morgan v. Varick*, 8 Wend. 587; *Robinson v. Walker*, 50 Mo. 19; *Pella v. Scholte*, 24 Iowa 293; *Doe v. Eslara*, 11 Ala. 1028; *Norvell v. Gray*, 1 Swan (Tenn.) 96.

5. The deed from McKeen to Woods, being duly proven when recorded, is to be considered as a recorded deed since March 20th, 1868, when it was admitted to record. The deed from McKeen to Casey was not acknowledged or proven when it was recorded, and, therefore, had no right upon the record. The act of 1847, now W. S. 595, §§ 35, 36, did not include deeds to military

bounty lands. *Crispen v. Hannavan*, 50 Mo. 415; *Ryder v. Fash*, 50 Mo. 476.

H. Lander for defendant in error.

1. The deed from McKeen to Casey, dated March 11th, 1822, and recorded April 2nd, 1842, it being at the time "neither proven nor acknowledged," was duly recorded by operation of the 8th section of the act of February 2nd, 1847, now Sec. 35, p. 595, 1 Wag. Stat., and from the time of the passage of that act imparted notice. If it be said that this section does not apply, because the deed affects military bounty land, as to which another provision is made in the act concerning conveyances, (1 Wag. Stat., p. 278, §§ 35 to 38,) the answer is that this 35th section applies only to a class of deeds made in other States which have been acknowledged or proven according to the laws of the State where made. *Tully v. Canfield*, 60 Mo. 100; *Totten v. James*, 55 Mo. 496.

2. Ferguson's entries under his title, first in October, 1868, followed up by actual possession to March 29th, 1869, and again on the first of March, 1870, followed up to July 10th, 1871, certainly were sufficient to interrupt the statute of limitations. The entries were made *animo clamandi*, accompanied with absolute dominion and expulsion of his adversary. Ang. Lim. § 378; *Altemas v. Campbell*, 9 Watts 28.

3. No particular form is required in making an entry to stop the running of the statute of limitations. 1 Hilliard Real Prop., p. 42, (3rd Ed.); *Woods v. Woods*, Grant's Cases, (Penn.) 229; *Robison v. Swett*, 3 Greenleaf R. 324; Ang. Lim. § 386.

4. An entry, before the statute period has run, destroys the efficacy of all prior possessions, so that to gain a title under the statute, a new adverse possession for the full time must be had. Ang. Lim., § 413; *Pederick v. Searle*, 5 Serg. & R. 236.

5. Our statute recognizes entries to stop the running of the statute. 2 Wag. Stat., p. 916, § 2; *Bradley v. West*, 60 Mo. 33.

6. The adverse possession must be continuous, without entry, claim or action on the other side. *Andrews v. Mulford*, 1 Haywood 311; *Park v. Cochran*, 1 Haywood 178; Ang. Lim., § 413, (note 2.)

7. There can be but one seizen of land at the same time. *Putnam v. Fisher*, 34 Maine 172.

8. The complaint is that Ferguson entered violently and forcibly. Every actual entry implies a trespass. Coke Litt. 245, b.

Hough, J.—This was an action of ejectment, instituted on the 1st day of May, 1872, for military bounty lands lying in the county of Chariton, Mo., in which the plaintiff had judgment. The plaintiff and the defendant claim through a common source of title. The plaintiff claims title under a deed from the common grantor, dated March 11th, 1822, executed in the State of Tennessee, and recorded in Chariton county on the 2nd day of April, 1842. This deed when recorded, was neither proven nor acknowledged. Plaintiff connected himself with this conveyance by a regular chain of title papers, all of which were recorded April 2nd, 1842, except the deed to himself, which was recorded June 19th, 1848. The defendant claims under a deed executed, by the common grantor, on the 17th of November, 1821, with which he connected himself by a regular chain of conveyances, all of which were recorded March 20th, 1868. The defendant also relied on the limitation of two years applicable to suits for military bounty lands, and proved the following facts: "That, in the month of October, 1868, one Krassig took the possession of the land sued for, and built a house on it; that shortly afterwards and about the time the house was completed, the plaintiff took forcible possession of the house, and put his tenants in it; that Krassig took the possession, and

built the house, under a contract for the purchase of the land, made with Lucius Salisbury, who is one of the grantors in defendant's chain of title; that some months after plaintiff took the possession of the premises from said Krassig, the said Krassig commenced suit against the tenants of said plaintiff, and on the 8th day of February, 1869, recovered judgment in forcible entry and detainer against them for said land, before a justice of the peace; that a writ of restitution was issued on said judgment, and was placed in the hands of the proper constable, who, on the 29th day of March, 1869, executed the same by putting the said Krassig in possession of the said premises; that, on the said day, the sale of said land by Salisbury to said Krassig was annulled, and the said Salisbury took the land back from said Krassig; that, on the said day the said Salisbury rented said premises to one Freeman, who went into the possession thereof, and remained until about the 1st day of March, 1870; that, about said time the plaintiff again took forcible possession of said premises, and put his tenants on the same; that, on the 14th day of April, 1870, the said Salisbury commenced a suit for forcible entry and detainer against Stephen Wilson et al., who were the tenants of plaintiff, before a justice of the peace, and, on the 8th day of September, 1870, recovered judgment for the possession of said premises; that defendants appealed from said judgment to the circuit court of Chariton county, Missouri, where, on the 23rd day of May, 1871, the said Salisbury again recovered judgment for the possession of said premises, and, on the 10th day of July, 1871, was put in the possession of said premises by a writ of restitution, issued on said judgment; and that said Salisbury and his grantee, Thomas, one of the defendants in this case, by themselves and tenants, have ever since held the possession of said premises, and made valuable improvements thereon." It was admitted by the defendants, at the instance of the plaintiff, that the plaintiff commenced an action of ejectment, for the land in suit, in

the Chariton court of common pleas, a court of competent jurisdiction, against the tenants of Salisbury, September 1st, 1871, which was continued until April 2nd, 1872, when plaintiff suffered a non-suit, and commenced this action May 1st, 1872.

Sections 35 to 38, inclusive, of chapter 109 of the General Statutes, in relation to conveyances, first enacted in 1843, provide, that every instrument of writing executed out of this State, and within the United States, which conveys or affects military bounty lands in this State, and which is acknowledged or proved according to the laws and usages of the place where executed, which has been filed for record and recorded in the proper office, although such filing or recording may not have been in accordance with any law in force, shall impart the same notice as if the acknowledgment or proof had been made in accordance with law; and that certified copies of such instruments, or of the record thereof, shall, upon proof of the loss or destruction of the original instrument, be read in evidence with like effect and on the same conditions as the original instrument. By the 35th section of chapter 143 of the General Statutes in relation to evidence, first enacted February 2nd, 1847, it is provided that the records made by the recorder of the proper county, by copying from any deed of conveyance, that has neither been proven nor acknowledged, or which has been proven or acknowledged, but not in accordance with the law in force at the time the same was done, shall impart notice to all persons of the contents of such instruments, and all subsequent purchasers and mortgagees shall be deemed to purchase with notice thereof.

1. MILITARY BOUNTY LANDS. recorded deed: notice.

In *Crispen v. Hannavan*, 50 Mo. 416, it was said that the 35th section of the chapter in relation to evidence, was not applicable to military bounty lands; but the remarks of the judge who delivered the opinion of the court in that case, must be construed with reference to the character of the conveyances then under consideration. Those

conveyances were executed out of the State, and were acknowledged before a notary public, one in the District of Columbia, and the other in the State of Kentucky, and the court held that their admissibility as evidence was to be determined by reference alone to the 35th, 36th and 37th sections of the statute of conveyances, relating to military bounty lands; and as there was no testimony showing that at the date of their execution a notary public was authorized to take the proof or acknowledgment thereof, either in the District of Columbia or in the State of Kentucky, they were properly excluded. Of course they could not have been admitted, in any court, under the 35th and 36th sections of the chapter on evidence, until it was shown that they had not been acknowledged or proven according to law. The laws of the several States are to be proven like other facts, and there was no evidence on that subject. It was obviously not intended to declare that the 35th section of the chapter on evidence, can in no case be held to include conveyances of military bounty lands. Conveyances executed within this State, for instance, which are neither proven nor acknowledged, would be covered by this section, whether they passed the title to military bounty lands or other lands; and if neither proven nor acknowledged, we can perceive no good reason why they should not be held to be included within the provisions of this section, although executed outside of this State. Those conveyances only are excluded from the operation of the 35th section of the statute on evidence, which are included in the 35th section of the statute on conveyances, and those included in the latter section are such, only, as have been executed and acknowledged out of this State and within the United States, according to the law of the place where executed. *Tully v. Canfield*, 60 Mo. 100. That such was the law prior to the passage of the act of March 22nd, 1873, (acts 1873, p. 44,) is shown by the opinion of this court in *Totten v. James*, 55 Mo. 496, wherein the act of 1873 was declared to be but a legislative inter-

pretation of sections 35 and 36 of the statute on evidence. That act of Assembly added nothing in reality to the scope and efficacy of those provisions, and was doubtless prompted by the general character of the remarks made in *Crispen v. Hannavan*, which was decided in 1872. As the deed from McKeen to Casey was neither proven nor acknowledged at the time it was recorded, April 2nd, 1842, it clearly comes within the provisions of the 35th section of the statute on evidence, and consequently affected all subsequent purchasers with notice from the 2nd of February, 1847. We are of opinion, therefore, that the paper title of the plaintiff is the better title.

This being the case, the plaintiff is entitled to recover, unless the defendants have shown an adverse possession for the period of two years. The plaintiff contends that his entry and possession thereunder in 1868, and his subsequent entry and possession in 1870, destroyed the continuity of the defendant's possession and interrupted the operation of the statute. It may well be doubted whether the common law right of entry, though apparently recognized in the second section of our statute of limitations, has any existence in this State; if it has, it is certainly of no practical importance. Whether the construction, therefore, which has been given to our statute of forcible entry and detainer, which was enacted before the adoption of the common law by us, is such as to make all common law entries unlawful, need not now be determined, as, under our statute, no entry can be held to be sufficient or valid as a claim, unless suit be commenced thereon within one year after making such entry, and within the time limited for bringing an action of ejectment. The plaintiff's entries in the present case can, consequently, avail him nothing, even if they could be considered as common law entries, inasmuch as no suit was commenced by him thereon, within one year after the were made.

2. ADVERSE POSSESSION; hostile entry: statute of limitations.

Besides, the entries proven to have been made by the

plaintiff, were not, in their character, such as were recognized at common law, as they were made with force and strong hand. Such entries are not only in violation of our forcible entry and detainer law, but they were prohibited by the British Statutes in force prior to the fourth year of James the First. "The remedy by entry," says Blackstone, "must be pursued according to statute 5 Ric. II St. 1 C. 8, in a peaceable and easy manner; and not with force and strong hand. For, if one turns and keeps another out of possession forcibly, this is an injury of both a civil and a criminal nature. The civil is remedied by immediate restitution, which puts the ancient possessor in *statu quo.*" Com., Vol. 2, 179. A rule which would allow the owner of land to arrest the operation of the statute of limitations by a forcible intrusion upon the peaceable possession of an adverse occupant, and his expulsion from the premises, would be followed by the most pernicious consequences. Violence and disorder would speedily ensue, and for the peaceful methods of the law would be substituted the hostile conflicts of opposing claimants. If the owner of land wrest the possession by force from the adverse occupant, when restitution is made by law, the period during which the forcible possesseion was held by the owner, will be added to, and become a part of, the adverse possession of such occupant. *Robinson v. Walker*, 50 Mo. 19; *Pella v. Scholte*, 24 Iowa 283. It follows from the foregoing views, that the forcible intrusion of the plaintiff into the possession of the premises sued for, did not suspend the operation of the statute of limitations, and on the adverse possession shown by the defendant, he was entitled to a verdict. The judgment will be reversed and the cause remanded. All concur.

REVERSED.

BRADSHAW, *Appellant* v. YATES.

1. **Setting Aside a Deed for Undue Influence.** In a suit to set aside a deed as having been obtained by undue influence practiced upon the plaintiff by her step-father, the defendant, it was admitted by the pleadings that when plaintiff was nine years of age her mother, being a widow, intermarried with defendant, and from that time plaintiff lived with defendant as a member of his family, that she was taught by her mother to look upon defendant as her father; that he became her guardian and acquired her complete confidence; that in proceedings for the partition of the estate of her deceased father, a life estate in certain land was assigned to her mother for dower, while other lands were set apart in fee to the children, including plaintiff; that by the repeated representations and importunities of defendant, she was induced to believe that a wrong had been done in making the partition, and to promise that when she came of age she would convey to defendant her interest in the dower land; that when she had attained the age of twenty-two years, and while she was still a member of his household, under his influence, and impressed with the belief that it would be but an act of justice to convey her interest to him, she carried out her promise, and made the conveyance; *Held*, that these facts constituted at least a *prima facie* case of legal fraud, and imposed upon defendant the burden of showing that absolute fairness, adequacy and equity characterized the transaction.

2. **Laches.** Courts of equity discountenance laches, and deny aid to those who have slept upon their rights for such length of time that their assertion would be against good conscience and operate as a fraud. Mere lapse of time, however short of the period fixed by the statute of limitations, will not bar a claim to equitable relief where the right is clear, and there are no countervailing circumstances.

   Case adjudged. Nearly ten years had elapsed since the execution of a deed procured by undue influence; but, for a year afterwards, the grantor remained in the grantee's house, and under his influence, and then she became a *feme covert;* the grantee, too, had the right to use and occupy the land until the expiration of an existing life estate; suit was brought within three years after that event, and it was not clear that, prior to the suit, she was free from the delusion under which she made the deed; *Held*, that, under these circumstances, her inaction did not debar her from equitable relief.

3. **Setting Aside a Deed for Undue Influence:** MEASURE OF RELIEF: TENANT IN COMMON. In the present case the plaintiff had a clear right to have a deed which she had made to an undivided half

of a tract of land set aside as having been obtained by the exercise of undue influence, but she had permitted almost ten years to elapse before bringing her suit. In the meantime the defendant, who besides being the grantee in this deed, was the owner of the other half interest in the land, had, with the knowledge of plaintiff, and without objection from her, made permanent and valuable improvements on the land; *Held*, that, under these circumstances, the deed ought not to be set aside without terms, but the value of the land, as it was before the improvements were made, should be ascertained, and if defendant would pay plaintiff that sum, with interest, within a time to be fixed by the trial court, the deed should stand, otherwise it should be set aside.

Appeal from Lewis Circuit Court.—Hon. E. V. Wilson, Judge.

Glover & Shepley for appellant.

1. A deed is deemed absolutely void if made during the existence of a confidential relation; and the relation of parent and child existed in this case, at the execution of the deed, and continued for sometime after, and up to the marriage of the plaintiff. If the relation of parent and child had ceased, still the deed must be held void, unless it is shown that the influence of the relation had ceased, and this cannot be done while both step-father and mother are proved to have solicited and urged the making of the deed, entreating her, as a dutiful child, to make it. *Wright v. Proud*, 13 Vesey, Jr. 137; *Dawson v. Massey*, 1 Ball & Beatty 229; *Lake v. Raney*, 33 Barb. 68, 49; *Lee v. Dill*, 11 Abb. Pr. R. 219; *Archer v. Hudson*, 7 Beav. 558, 551; *Maitland v. Irving*, 15 Simon 437; *Gale v. Wells*, 12 Barb. 85; *Garvin v. Williams*, 44 Mo. 470; *Cadwallader v. West*, 48 Mo. 483.

2. The defense of acquiescence or lapse of time has no place till after the perfect freedom and independence of the grantor. *Hatch v. Hatch*, 9 Vesey, 292; *Taylor v. Taylor*, 8 How. 183; *Hylton v. Hylton*, 2 Vesey, Sr. 547; *Huguenin v. Baseley*, 14 Vesey, Jr. 273; *Bury v. Openheim*, 26 Beav. 598; *Chambers v. Crabbe*, 34 Beav. 459; *Wright v.*

Vanderplank, 8 DeGex, McN. & G. 146; *Goddard v. Carlisle*, 9 Price 169; *Sercombe v. Saunders*, 34 Beav. 382; *Poston v. Gillespie*, 5 Jones Eq. 264; *Berdoe v. Dawson*, 34 Beav. 603; *Miller v. McIntyre*, 6 Peters 61, *Elmendorf v. Taylor*, 10 Wheat. 168, 152, *Oakland v. Carpentier*, 13 Cal. 540; *Weaver v. Froman*, 6 J. J Marsh. 214; *Keeton v. Keeton*, 20 Mo. 530.

3. Mrs. Yates held a particular estate for life as tenant in dower, and until her death, there was no adverse possession, and the statute of limitations could not begin to run. *Honner v. Morton*, 3 Russ. Ch. 65, *Rabsuhl v. Lack*, 35 Mo. 316; *Gray v. Givens*, 26 Mo. 291; *Salmon v. Davis*, 29 Mo. 176; *Reaume v. Chambers*, 22 Mo. 36.

4. Immediately upon plaintiff's marriage, she fell under the control of her husband, and has never been a free woman for a moment. *Aylward v. Kearney*, 2 Ball & Beatty 463; *Gouland v. DeFaria*, 17 Vesey, Jr. 25, 20; *Sharp v. Leach*, 31 Beav. 503; *Salmon v. Cutts*, 4 DeGex & Smales 132.

5. When a deed is impeached for fraud, the grantee must prove he paid the consideration mentioned in it. *Clarkson v. Hanway*, 2 P. Williams 203; *Walt v. Grove*, 2 Sch. & Lef. 501; *Tribble v. Oldham*, 5 J. J Marsh. 144; *Bridgman v. Green*, 2 Ves., Sr. 628.

H. S. Lipscomb and J. G. Blair for respondent.

1. Plaintiff comprehended her rights and all the facts involved, and acted freely and of her own accord. Defendant has shown that he did not create her intention to convey, and that the deed was not the result of undue influence, but that his dealing with her was fair and frank. The court below, with all the witnesses before it, and judging the matter sworn to, and of the manner and deportment of the witnesses, has, by its judgment, found in favor of the defendant, and its finding should not be disturbed. *Sharpe v. McPike*, 62 Mo. 300; *Biggerstaff v. Hoyt*, 62 Mo. 484; *Ames v. Gilmore*, 59 Mo. 548-9.

2. For nearly ten years plaintiffs have acquiesced in the transfer, and it is now too late to assail it. *Morse v. Royal*, 12 Vesey, Jr. Ch. 378.

3. Plaintiffs, both of full age and with perfect knowledge of their claim as now pretended, stood by for nearly ten years and silently witnessed the improvements as they were made upon the land by defendant. The dower-estate of Mrs. Yates did not close their mouths, nor were the courts closed against a bill to set aside the deed complained of. They are estopped from claiming now. *Collins v. Rogers*, 63 Mo. 515; *Landrum v. Union Bank*, 63 Mo. 56; Bigelow on Estoppel, pp. 488, 490, 500, 503; 2 Story Eq., §§ 694-5; *Petit v. Shepherd*, 5 Paige 493; *Morse v. Royal*, 12 Vesey, Jr. Chy. 378; 1 Story Eq., Secs. 385, 388, 389; 2 Story Eq., Secs. 1540, 1541; *Irvine v. Irvine*, 9 Wallace 617; *Hartman v. Kendall*, 4 Ind. 403; *Wallace v. Lewis*, 4 Har. (Del.) 75; *Wheaton v. East*, 5 Yerg. 41; *Rice v. Dewey*, 54 Barb. 470; *Cresinger v. Welch*, 15 Ohio 156; Hermann on Estoppel, 409, 10, 11, and 415, 478, 494; *Moreman v. Talbot*, 55 Mo. 392. It was the duty of plaintiffs to speak long ago. Silence in this case until after improvements made is a fraud. The fact that Mrs. Bradshaw is a married woman will not aid her. *Femes covert* and infants are prevented by estoppel from profiting by their own wrong or fraud. Hermann on Estop. 477–8; *Evans v. Bicknell*, 6 Vesey, Jun. 174; *Fulton v. Moore*, 25 Penn. 468; *Drake v. Glover*, 30 Ala. 382.

Norton, J.—This is a proceeding in equity, commenced in the circuit court of Lewis county, on the 26th day of March, 1873, for the purpose of setting aside a deed made by plaintiff, Elizabeth Bradshaw, in April, 1863, conveying to defendant certain land therein described. It is substantially alleged in the petition that William Barclay died in April, 1848, leaving a widow and three children, of whom plaintiff, Elizabeth, was one, and possessed, besides personal estate, of three hundred and ten acres of land;

that Sarah Barclay, the widow, lived in the mansion house on said land till 1849, when she intermarried with the defendant, who, with his four children, removed to said mansion house, and there, with the said Sarah and her children, made up the household; that, at the time of her mother's marriage with defendant, plaintiff was about nine years old; that defendant, in 1852, was appointed her guardian, and acted as such till 1864, when he made a final settlement with her. It is further alleged that in 1859 partition of the real estate was made by virtue of an order of the Lewis county circuit court, in which 105 acres of the land was set apart to plaintiff, and 100 acres assigned and admeasured to her mother as dower; that she was enjoined by her mother to treat and regard defendant as her father, and that, by virtue of his relation as father and guardian, she trusted defendant implicitly, and relied solely upon him to protect and control her pecuniary interests absolutely; that soon after said dower was assigned, defendant represented to plaintiff that in right and justice her mother was entitled to an absolute instead of a life estate in the land assigned her, and that the commissioners would have so allotted it to her but for the objection of Mr. Sublett, who had married Sarah, the sister of plaintiff; that he was justly entitled to said one hundred acres in fee; that he had applied to said Sublett and Sarah to do him justice and convey to him said land, which they had refused to do, and appealed to plaintiff not to treat him in like manner, but to convey her interest to him as an act of justice and right. It is also alleged that by reason of such appeals and the repeated and continued importunities of defendant, plaintiff, while yet a minor, was induced to promise defendant that she would convey to him all her interest in said land; that relying on the representations of defendant that her mother had been wronged by the commissioners, and that she ought in justice to make him a deed, she promised to do so when she attained her majority; that these importunities were from time to time continued

till finally, about the time of defendant's final settlement with her as guardian, and while living with defendant, as a member of his family, and under the influence acquired by defendant over her, and relying upon his representations that what he claimed was rightful, she was induced to execute the deed conveying to defendant her interest in said dower land; that although four hundred dollars was named in said deed as the consideration, no part of it was paid or to be paid, and that the same was procured by fraud, undue influence and misrepresentations of defendant.

The defendant's answer is as follows: "The defendant, for answer, admits the making of the deed, but denies that the same was obtained by him from said Elizabeth by fraud, misrepresentations or undue influence exercised by this defendant over said Elizabeth; that said deed was made by said Elizabeth long after her arrival to the years of her majority, of her own free will and accord, for a legal and valid consideration." It is further alleged that plaintiff acquiesced in said deed till the suit was brought, and that defendant in the meantime, with the knowledge of plaintiff, and without objection from her, made lasting and valuable improvements on said land, and that she ought, therefore, to be estopped. The cause was tried by the court and judgment rendered for defendant, from which the plaintiffs have appealed to this court.

The main questions presented by the record are the following; 1st. Was the deed in controversy procured by the undue influence of defendant? 2nd If so, has plaintiff lost her right to the relief she seeks by delay in instituting her suit, and, if not, should the first question be determined in the affirmative, what is the relief which should be accorded to her under the pleadings and evidence? We think it is admitted by the pleadings that defendant, at the time the deed was executed, sustained the double relation of father and guardian to plaintiff, the relation of father being assumed in

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1849, and that of guardian in 1852; that defendant had thus acquired the complete confidence of plaintiff, and represented to her while in her minority, that the commissioners, in making partition of the estate of her deceased father, had committed a wrong in assigning a life, instead of a fee simple, estate to her mother in the one hundred acres of land as dower, that he, in justice, was entitled to said one hundred acres, and appealed to plaintiff to make him a deed in fee of her interest therein as an act of justice and right; that by reason of said appeal and the continued importunities of defendant, plaintiff, while a minor, was induced to promise him that she, on arriving at age, would convey to him such interest; that said promise was made by plaintiff in full reliance on the statements of defendant that he had been wronged, and that, in right and justice, she ought so to convey it; that these importunities and the said promise of plaintiff were repeated till, finally, plaintiff, at about the age of twenty-two years, and about the time of defendant's final settlement with her, as guardian, and while being with him as a member of his family, and entirely under his influence, and relying on his representations, and believing by reason thereof, that the making of the deed was an act of sheer justice, and that she was bound by her promise formerly made, she was induced to execute it. It is also admitted that, although four hundred dollars was the consideration named in the deed, no consideration was paid by defendant therefor, and that at the time of its execution, there was no pretense that any valuable consideration had passed, or was to pass from said defendant to plaintiff therefor.

The only denial which the answer contains is to the conclusion which the pleader in his petition reached upon the allegation made therein, viz: that the deed sought to be avoided was obtained by fraud, misrepresentation and undue influence. This does not amount to a denial of the facts alleged in the petition on which the pleader based the allegation, as a legal conclusion, that the deed was ob-

tained by fraud and undue influence. When this answer was filed, it was a requirement of the law that each allegation should be specifically denied, and if not thus denied, they should be taken as admitted. Taking then the allegations of the petition as confessed, they not only establish the existence of confidential relations between plaintiff and defendant, but an abuse thereof by defendant at and before the execution of the deed, and fully make out, to say the least, a *prima facie* case of legal fraud in the procurement of the deed, thus casting upon defendant the burden of showing that absolute fairness, adequacy and equity characterized the transaction.

In *Street v. Goss*, 62 Mo. 228, it was held that "the rule on this point was of universal recognition, and applies co-extensively with the existence of confidential relations. In such cases it is not necessary to show that fraud or imposition was practiced upon him who bestows the confidence, but simply the existence of such confidential relations, and that during that time the conveyance was made. When this is done, the onus of showing the fairness of the transaction is on him who claims under the conveyance." "When confidential relations are shown to exist, courts of equity, where the inferior makes a conveyance to the superior, look narrowly to the circumstances, and require the act to be done with reasonable knowledge of all the facts necessary to a full understanding of what the grantor is doing." (*Ranken et al. v. Patton et al.*, 65 Mo. 378.)

The allegations of the petition being admitted, because not denied, shows clearly the existence of such relations between the plaintiff and defendant when the deed now assailed was made, and, also, that it was executed by plaintiff to carry out the will of defendant, which, by reason of confidence reposed on account of said relations, had been stamped upon the mind of plaintiff so as to make her thoughts on the subject matter of the transaction the thoughts of defendant. A deed executed under such circ-

umstances can not be allowed to stand in a court of conscience. To give such instruments countenance and support would, in all cases where confidential relations exist, make the weaker party a victim to the rapacity of the stronger, and allow him, to whom interests are confided for preservation and protection, to destroy and appropriate them to his own use.

This is especially applicable in the present case, for even if, in truth, the mother of plaintiff should have had a child's part allotted to her in the land, the subject of this controversy whereby she would have taken the fee, if any obligation at all by reason thereof was cast upon plaintiff, it could have extended no farther than the execution of a deed to her mother. Defendant, by reason of any such supposed obligation, would not in any view have been entitled to the land, and by causing the deed to be made to himself, changed the entire course of descent therein.

To avoid the force of the presumption raised from the facts alleged and admitted, defendant avers that the deed
2. LACHES. was made on valuable consideration, and of plaintiff's own free will, and that plaintiff had acquiesced therein till this suit was brought, and had seen defendant erecting lasting and valuable improvements on the land without objecting thereto, by reason of all which she should be estopped from now asserting her claim. Although the consideration mentioned in the deed is four hundred dollars, it is perfectly clear from the evidence that no consideration, whatever, was paid. The plaintiff, in her evidence states this, and in this statement she is supported by the evidence of defendant, who testified that no money was paid, and none tendered. Biggs, who was called upon by defendant to take the acknowledgment, swears that defendant, when he came for him, told him that plaintiff had given him the land, because Sublett had treated him so; that he had treated her as his child, and she had treated him as her father. Defendant further tes-

tified that the deed was prepared when plaintiff was not present, and that she had, while in her minority, said she would make him a deed and charge nothing for it; that nearly one year after the deed was made, on the occasion of his final settlement with her, he said: "Bettie, there is due me, as guardian fees, about $138, will you accept that as a consideration for the deed?" to which she assented. Looking at the guardian settlements of defendant in evidence, we are not able to see any room for such a charge. The evidence shows that defendant, after his marriage in 1849, removed with his four children to the house of plaintiff's mother, and that he became guardian in 1852; and that, in each of his annual settlements, he charged plaintiff with board and clothing, &c., $100, till 1857; that he had the use of all the land, that its rental was worth $2.50 per acre; that he, in his settlements, credited himself with 5 per cent. commission, and also charged by the day for the time spent in the business. It further shows that he made his final settlement, as guardian, with plaintiff, in March, 1864, nearly one year after the execution of the deed; that there was no one present at said settlement but defendant and his ward, and that it was made in a detached room, used as a kitchen; that defendant made all the figures, and plaintiff accepted what he said and did as true, and after it was computed, went with defendant to the proper court and entered satisfaction. The settlements of defendant are in evidence, and the following is a summary of them. In his first settlement of 1853, he charges himself with hire of negroes, $100, credits himself with $100 for board, clothing, tuition and medical bills, $2 for services and $8 for taxes, bringing his ward in debt $10; no voucher for tuition or medical bill accompanying settlement. In 1854 he charges himself, on joint account of Elizabeth and Sarah, with hire of negroes, $239.99, and among other things credits himself with $200 for board, clothing, tuition and medical bills, again bringing his ward in debt, there being no

vouchers with the settlement for tuition or medical bills. In 1855 he charges himself with $274.67 hire of negroes, and credits himself with $200 board, clothing, &c., without vouchers, again bringing his ward in debt. In 1856 he makes another joint settlement, charging himself with four years rent of 104 acres of land at $1.50 per acre, and hire of negroes, $326, and credits himself with $200 for building stables and corn-crib; $200 for board, clothing, &c., two-thirds of 9000 rails, $120, shingling house, $59, and two-thirds of fee for procuring assignment of dower, $16, without voucher, and brings himself in debt for the first time to his two wards, $122, or $61 each. In 1857, in another joint settlement, he charges himself with rent of 104 acres of land at $1.50 per acre, balance on last settlement of $122, without interest, and hire of negroes, and credits himself with $81, commission, and $114, two-thirds of resetting 57,140 rails. No settlement appears to have been made in 1859. In 1860 he makes a settlement as guardian of plaintiff, with balance, $333.50, hire of negroes $113, proceeds of sale of negroes $673, and credits himself among other things, with $62 commission.

These settlements have been adverted to for the purpose of showing that defendant looked well to his own interests, as evidenced by the fact that, for the first four years of his guardianship, he consumed the personal estate of his ward by charging her for board while an inmate of her mother's house, as a member of defendant's family, and living on the land left by her father, from which the family of defendant, as well as that of Barclay, derived their support, and this before partition of the land. They also show a state of facts which would have made it eminently proper that plaintiff should have had in the final settlement, between her and defendant in 1864, nearly one year after the execution of the deed, the advice of some one besides the defendant, who was conversant with such matters. The fact that it was made without the advice of such a person tends strongly to show the implicit reliance

of plaintiff in every thing that defendant did or said in regard to her interests. The evidence, as well as the pleadings clearly show that the deed in question is not supported by any valuable consideration, and that it was made by plaintiff under the false impression that defendant had been wronged, and was entitled by right to the land she conveyed, and that these impressions were superinduced by defendant and his wife.

It is, however, said that plaintiff has acquiesced in the transaction for such a length of time as to bar her right to relief in equity. The doctrine is unquestioned that courts of equity discountenance laches, even to the extent of denying aid to those who have slept upon their rights for such length of time as that it would be against good conscience, and operate as a fraud upon the other party to allow them to be asserted. What shall be deemed due diligence, in the institution of an equitable proceeding of this character, is not susceptible of a definite rule, but must, in a degree, depend upon the circumstances of the particular case, and be governed by the sound discretion of the court. *Bergen v. Bennett*, 1 Caines' Cases 19; *Landrum v. Union Bank*, 63 Mo. 56. There is no especial rule, but each case, as it arises, must be determined by its own particular circumstances. *McQuiddy v. Ware*, 20 Wall. 19.

In *Kelly v. Hurt*, 61 Mo. 466, it was held that mere lapse of time, short of the period fixed by the statute of limitations, will not bar a claim to equitable relief where the right is clear and there are no countervailing circumstances. It results from the principle contained in the authority last cited, that the mere fact that plaintiff did not institute her suit for nearly ten years after the execution of the deed, is not sufficient to bar her right to relief, unless there are circumstances countervailing this right. We do not think the circumstances connected with this case are of that character. Plaintiff, for about a year after the execution of the deed, remained an inmate of defendant's family, and was under the same influence which

operated upon her when the conveyance was executed, till she married in 1864, since which time she has been a *feme covert*. Besides this, defendant had the right to the use and occupancy of the land conveyed, independent of the deed, till the death of defendant's wife, which occurred in 1870, and this suit was brought within three years after that time, and it is not clear that she was at any time prior to the commencement of the suit, free from the delusion under which she made the deed.

But while this inaction of plaintiff may not be deemed such as to deny her a standing in a court of equity, it may, in connection with facts in the case, be considered with reference to the relief she ought to have. Her right to a decree declaring the deed to defendant void, we think, is clear; but when the fact is considered that the interest conveyed by the deed was an undivided half in a tract of land, in which the defendant was the owner of the other half, and that defendant, who was at least a tenant in common, erected on said tract valuable and permanent improvements, costing in the neighborhood of $3,000 with the knowledge of plaintiff, and without objection from her, it would be inequitable to allow her to take the benefit of such improvements. The rights of the parties arising out of this state of facts might be adjusted in an equitable proceeding in partition, as the statutory mode of partition does not divest courts of chancery of jurisdiction in suits for partition. *Spitts v. Wells*, 18 Mo. 468. And in such equitable partition, the portion of the land, on which the improvements were erected, might be assigned to the party erecting them, or compensation made in some other way. As the whole subject is, however, now before us, and as it is the policy of the courts of equity to prevent multiplicity of suits, we are inclined to adjust the rights of the parties without remitting them to another action, and, in doing so, are disposed to adopt a principle analogous to that in ejectment proceedings, where an occupying claimant in good faith makes

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valuable improvements, and shall therefore reverse the judgment and remand the cause, with directions to the circuit court to ascertain the value of the land in question, in 1871, without reference to the improvements made by defendant in erecting a dwelling, and if defendant, in a given time, to be fixed by the court, pay said plaintiff, or bring into court such ascertained value with interest from January, 1871, the title of plaintiff in said land shall be decreed to be in defendant, and, if not so paid, a decree absolute be entered annulling and setting aside said deed. Had the defendant occupied the land under no other title than what he claimed to have acquired under the deed of plaintiff, we would have set it aside without terms, as we can give no recognition to the principle that one who obtains a deed under such circumstances as would make it fraudulent in law, can, by erecting improvements on the land conveyed, demand compensation therefor, as condition precedent to the grantor's right to have it declared void.

With the concurrence of the other judges, the judgment is reversed and cause remanded, to be disposed of in accordance with the views herein expressed.

REVERSED.

UPTON *et al.*, *Appellants* v. JAMESON.

Payment to Agent after notice of Revocation of his Authority. Payment of the amount of a promissory note to a former agent of the holder, is no defense to a suit upon the note, if it was made after the payor had received notice that the note had been placed by the holder in the hands of another for collection.

Appeal from Worth Circuit Court.—HON. SAMUEL A. RICHARDSON, Judge.

The plaintiffs being engaged in the manufacture and sale of threshing machines in Michigan, through Auter Bros. & Schutt, a firm doing business in Cameron, Missouri, sold one of their machines to defendants. The purchase money was paid partly in cash and partly in three notes. These notes were made payable at Cameron to the order of plaintiffs, and matured at different times, and were delivered to Auter Bros. & Schutt. When the first two of them became due, they were in the hands of this firm, and the money was paid to them, and the notes were taken up by the defendants. At the time the second note was paid off the third was also in the hands of Auter Bros. & Schutt, and defendents made a small payment on account of it. A few days before the third note matured, defendants paid Auter Bros. & Schutt the balance due upon it, taking their receipt. Auter Bros. & Schutt then claimed that it was still in their possession, but said they could not find it, and promised to hunt it up and send it to defendants. The truth was that they had some months before sent it to the plaintiffs, who had afterwards forwarded it to a bank in Cameron for collection. This suit was brought upon this note. The cashier of the Cameron Bank gave his deposition to the effect that his bank had received the note from plaintiffs for collection, and had, by letters written by him, given notice to defendants of this fact, and had requested them to call and pay the note before they made the payment to Auter Bros. & Schutt. The second instruction asked by the plaintiffs, and refused by the court, is as follows:

Though the jury may believe, from the evidence, that the defendants, or some one of them, may have paid the full amount of the note sued on to Auter Bros. & Schutt, yet, if they further believe from the evidence, that the said note was sent by the plaintiffs, who had the same in their possession, on and prior to the 18th day of September, 1870, to the bank at Cameron, Missouri, and that on the 18th

day of September, 1870, or in a short time thereafter, the bank at Cameron, Missouri, notified the defendants, or some one of them, that said bank had said note for collection, and that the defendants, or any one of them, received said notice, and afterwards, with the notice that said Cameron bank had said note for collection, the defendants paid the amount of the note to Auter Bros. & Schutt, the jury will find for plaintiffs.

Bennett Pike & Vinton Pike and Geo. W. Lewis for appellants.

The court erred in refusing to allow that part of House's deposition to be read relating to the contents of his letters to defendants. They were notices, and notice to produce was not necessary. 1 Greenlf. Ev. § 561; *Hughes v. Hays*, 4 Mo. 209; *Barr v. Armstrong*, 56 Mo. 586. The second instruction, asked by plaintiffs, was predicated upon the testimony of House, and should have been given.

John Edwards and Thos. H. Collins, for respondents.

By an examination of the deposition of House, it will be seen that there was no evidence whatever of the loss of the letters, or that they had been mailed. The loss of the letters, or their destruction, had to be shown before their contents could be proved by oral evidence. *Meyers v. Russell*, 52 Mo. 26; 1 Greenlf., Sec. 558. The existence of these letters was a disputed fact, for all of the defendants, in their rebutting evidence, denied the receipt of them. 1 Greenleaf, Sec. 88. Notice to produce the letters should have been served on defendants. *Patton v. Ash*, 7 Serg. & Rawle, (Penn.) 116; 1 Greenleaf, Sec. 560; 2 Phillips on Ev. (5th Am. Ed.,) p. 442, marginal page 526, and Note 453. There was not the slightest evidence that the letters had been mailed, and had thus presumptively gone by due course of mail to Jameson, or the other defend-

ants. 1 Greenleaf, Sec. 40; 2 Philips on Ev. (5th Am, Ed.) p. 461, marginal p. 549, Note 469.

NAPTON, J.—The deposition of House ought not to have been excluded from the jury, as it was essentially. The defendants themselves established the fact that his letters, one of them at least, had been received and destroyed or lost, and his statement that he wrote three letters to the defendants, or some of them, by addressing them at the postoffice or town where the notes were dated, means, of course, that he mailed them. Taking together the statements of House, and the statements of the defendants, the point of the case is, whether the defendants paid off the note sued on to Auter Bros. & Schutt, before any one of these letters was received. Upon this point the statements of the defendants and of House were irreconcilable, one or the other must have been mistaken. The question ought to have been submitted to the jury. If the defendants were advised by the cashier of the Cameron bank that the note in suit had been placed there by the plaintiffs for collection, and, after that, paid the note to Auter Bros. & Schutt, the loss should be theirs, as such information was substantially a notice of the revocation of the authority of Auter Bros. & Schutt to collect the note; had such authority ever in fact existed. On the other hand, if the defendants did not receive said notice, the loss should be to the plaintiffs. In short, the second instruction, asked by the plaintiff, should have been given.

The judgment is therefore reversed, and the cause remanded. The other judges concur.

REVERSED.